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Supreme Court, U.S.
FILED
AUG 3 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, MOTION TO EXPEDITE AND BRIEFS IN SUPPORT OF MOTIONS

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General
Attorneys for Plaintiff
223 State Office Building
Salem, Oregon 97310
503 378-3564

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ....., Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Oregon, by its Attorney General, respectfully asks leave of the Court to file the Complaint which is submitted herewith.

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General

August, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ....., Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

COMPLAINT

The State of Oregon, by its Attorney General, brings this action against the defendant and for its cause of action states:

I.

This court has jurisdiction over this original action under Article III, Section 2, of the Constitution of the United States, and 28 U. S. Code, Section 1251 (b)(3).

II.

The State of Oregon was admitted into the Union under the act of February 14, 1859, 11 Stat. 383, and is a Sovereign State of the United States of America.

III.

The defendant is a resident and citizen of a State other than the plaintiff and is presently serving as the Attorney General of the United States.

IV.

The Congress of the United States enacted, and the President of the United States approved, on June 22, 1970, the "Voting Rights Act Amendments of 1970", Public Law 91–285, 91st Congress, H. R. 4249, (hereinafter referred to as the "Act") pertinent portions of which read:

* * *

"Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision

in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

V

The Constitution of the State of Oregon, approved by the vote of the people of Oregon Territory on November 9, 1857, and effective from February 14, 1859, to the present, provides in Article II, Section 2, Subsection (1) that:

"Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

"(a) Is 21 years of age or older;

"* * * * *"

This constitutional classification is a reasonable means to effect legitimate state purposes, and has never been applied or enforced by the plaintiff in any discriminatory manner in violation of the United States Constitution.

VI.

This action is brought by the plaintiff as a Sovereign *parens patriae* to preserve and maintain fair and reasonable registration and voter qualifications to the end of obtaining the most capable government for all of the plaintiff's inhabitants.

VII.

The Act is unconstitutional in that it violates the Tenth Amendment of the Constitution of the United States, it is not appropriate legislation to enforce the

Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, it is not plainly adapted to that end and it is inconsistent with the letter and spirit of that Constitution.

VIII.

The Office of the Secretary of State and the county clerks of the plaintiff are charged with the registration of qualified voters within the plaintiff's boundaries and would be put to considerable expense to accomplish the requirements of the Act.

IX.

By the terms of the Act the defendant is authorized and directed to enforce the Act and has indicated by letter to plaintiff's Governor that if plaintiff does not conform to the Act he intends to take action.

X.

Municipalities and political subdivisions of the plaintiff are anticipated to hold elections on matters of budget and financing in the early months of 1971. The fiscal stability of these subdivisions is dependent upon a speedy resolution of the constitutionality of the Act.

WHEREFORE, Plaintiff prays:

1. That a decree be entered judging the Act, particularly Title III, sections 301 and 302 thereof, in violation of the Constitution of the United States as drawn and applied to Plaintiff, its political subdivisions, officials and inhabitants.

2. That a decree be entered permanently enjoining

and prohibiting the Defendant from enforcing or attempting to enforce the Act, particularly Title III, Sections 301 and 302 with respect to the Plaintiff, its political subdivisions, officials and inhabitants.

3. For such other and further relief as this Court may deem proper and necessary.

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General
Room 322
State Office Building
Salem, Oregon 97310
503-378-4403

August, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ....., Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General

JURISDICTION

The original jurisdiction of the Court is invoked by authority of Article III, Section 2, of the Constitution of the United States and 28 U.S.C., Section 1251 (b)(3).

STATEMENT

The complaint which the plaintiff requests leave to file tests the constitutionality of the Voting Rights Act Amendments of 1970, Public Law 91-285, H. R. 4249, herein referred to as the Act. Plaintiff, the State of Oregon, requests a declaration that portions of the Act are unconstitutional and that the defendant, Attorney General of the United States, be permanently enjoined from enforcing the Act.

ARGUMENT

I. THE ORIGINAL JURISDICTION OF THE COURT IS PROPERLY INVOKED.

The Court considered original jurisdiction proper in *South Carolina v. Katzenbach*, 383 US 301, 15 L ed 2d 769, 86 S Ct 803 (1966). The complaint therein contained more elaborate allegations which are substantially similar if not identical, to the allegations herein. The parties there, as here, were one of the United States as plaintiff and the then Attorney General of the United States as defendant. The Motion for Leave to File a "bill of complaint" was granted by the court in *South Carolina v. Katzenbach*, 382 US 898 (1965).

In its opinion on the merits the court stated:

"Original jurisdiction is founded on the pre[illegible] of

> a controversy between a State and a citizen of another State under Art III, § 2 of the Constitution. See Georgia v. Pennsylvania R. Co., 324 US 439, 89 L ed 1051, yt S Ct 617." *South Carolina v. Katzenbach*, supra, 383 US at 307.

The court apparently considered that this was a proper case wherein the state might intervene by suit to protect its citizens against enforcement of an allegedly unconstitutional act of Congress, as indicated by dictum in *Massachusetts v. Mellon*, 262 US 447, 67 L ed 1078, 43 S Ct 597 (1922).

It is evident that Congress also felt that original jurisdiction in this court was a proper and appropriate method of determining the constitutionality of the Act as the test in *South Carolina v. Katzenbach*, supra, was specifically referred to in the Senate Judiciary Committee hearings.

The Court's exercise of original jurisdiction in this case will not involve it in difficult problems of enforcement. The constitutional declaration would complete the Court's function and there is no liklihood that the defendant would disobey the injunction if granted.

The issues here being, in a sense, a continuation of those presented in *South Carolina v. Katzenbach*, supra, and of equal if not greater urgency and importance, it follows that the considerations which led this Court to take jurisdiction of that case as an original suit are fully applicable here.

II. THE SIGNIFICANCE OF THE CONFLICT MERITS CONSIDERATION BY THE COURT.

The Act is in direct conflict with the constitutional provisions of the Plaintiff. This conflict must be resolved to determine the validity of imminent elections within the State of Oregon. Bond ssues authorized by elections after January 1, 1971, will not be certified as to conformity with election requirements whether 18 year olds are permitted to vote or not. A substantial portion of municipal and other necessary capital improvements are dependent upon that means of financing.①

The cost of registration of those enfranchised by the Act will be substantial and good fiscal management would forbid such an investment prior to a final determination of the constitutionality of the requirement.

Finally there is substantial and reasonable doubt as to the power of Congress to implement the Fourteenth Amendment in this manner.

> "* * * [T]he draftsmen sought to grant to Congress by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art I, § 8, cl 18. The classic formulation by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat 316, 421, 4 L ed 479, 605. 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistant with the letter and spirit of the constitution, are constitutional." *Katzenbach v. Morgan*, 384 US 641, 650, 16 L ed 2d 628, 86 S Ct 1717.

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① It is conservatively estimated that there will be in excess of 400 budget elections within political subdivisions of Oregon between January 1 and July 1, 1971.

There is serious doubt whether the provisions of the act challenged here are within the confines of that test.

The disposition of constitutional issue presented by this Court is called for by the foregoing reasons.

CONCLUSION

For the reasons stated, the motion for leave to file the complaint should be granted.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General
Room 322
State Office Building
Salem, Oregon 97310

August, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ....., Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

MOTION FOR LEAVE TO EXPEDITE

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General

The State of Oregon by its Attorney General requests the Court to accelerate these proceedings as follows:

(1) Upon the allowance of the Motion for Leave to File the Complaint the defendant be required to Answer or otherwise respond to the Complaint within fifteen days.

(2) The plaintiff be required to file its Brief on the merits thirty days after the defendant's response.

(3) The defendant be required to file his brief on the merits fifteen days after the filing of the plaintiff's brief.

(4) Oral argument be set by the Court at such time as the Court may direct subsequent to the filing of defendant's brief.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General
Room 322
State Office Building
Salem, Oregon 97310

August, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ....., Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

BRIEF IN SUPPORT OF MOTION TO EXPEDITE

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General

The similarity of issues and importance of the matters considered by the Court in *South Carolina v. Katzenbach*, 383 US 301, 15 L ed 2d 769, 86 S Ct 803 (1966) referred to in Plaintiff's Brief in Support of the Motion for Leave to File the Complaint herein make this motion equally apposite. The imminence of the effective date of the Act, January 1, 1971, coupled with the substantial constitutional questions raised by this confrontation support the granting of this motion.

The time schedule requested has been modeled on that granted in *South Carolina v. Katzenbach*, supra. It would afford adequate time for full preparation and obviate any requirement that the Court convene in extraordinary session for oral argument.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
Assistant Attorney General
Room 322
State Office Building
Salem, Oregon 97310

August, 1970

FILE
AUG 3 1
E. ROBERT SEAVER,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ---------44--------- ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND MOTION FOR EXPEDITED CONSIDERATION

* * *

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant
J. C. DAVIS
Assistant Attorney General
W. O. SHULTZ II
Assistant Attorney General
JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ---------- ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

MOTION FOR LEAVE TO FILE COMPLAINT

* * *

The State of Texas, by its Attorney General, respectfully asks leave of the Court to file its Complaint against John N. Mitchell, Attorney General of the United States, submitted herewith, for the reasons stated therein and in the supporting brief.

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant
J. C. DAVIS
Assistant Attorney General
W. O. SHULTZ II
Assistant Attorney General
JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ---------- ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

COMPLAINT

* * *

The State of Texas, Plaintiff, by its Attorney General, Crawford C. Martin, brings this action against the Defendant, John N. Mitchell, Attorney General of the United States, and for cause of action states as follows:

I.

The jurisdiction of this Court is invoked under Article III, Section 2, of the Constitution of the United States, and Section 1251(b)(3) of Title 28, United States Code.

II.

Plaintiff is a State of the United States and the Defendant is a citizen of the State of New York.

III.

Acting pursuant to the powers reposed in it as a sovereign State and in accordance with the responsibility imposed upon it by the Constitution of Texas

and the Constitution of the United States the Plaintiff has adopted provisions in its Constitution and statutes providing for and prescribing nondiscriminatory and reasonable election procedures for local, state, and national elections. These include provisions setting forth the qualifications necessary for a person to be a qualified elector and providing for the registration of such persons as a prerequisite to voting in elections held within the State of Texas.

IV.

Article VI, Sections 1 and 2, Constitution of Texas (Vernon's), and Articles 5.01, 5.02, Texas Election Code (Vernon's) provide that persons under the age of twenty-one (21) years shall not be allowed to vote in the State of Texas.

V.

The Congress of the United States has enacted, and the President has approved, Public Law 91-285, known as The Voting Rights Act Amendment of 1970 (hereafter referred to as the Act). Title III of the Act attempts to impose restrictions upon the power of the Plaintiff to provide and enforce nondiscriminatory and reasonable election procedures establishing the qualifications for electors in the State of Texas and providing for their registration. These provisions of the Act abolish and nullify the provisions of the Plaintiff's Constitution and statutes referred to in paragraph IV hereof.

VI.

Title III of the Act is not authorized under any of the powers conferred upon the Congress by any pro-

vision of the Constitution of the United States or the Amendments thereto.

VII.

Title III of the Act is contrary to and in derogation of Section 2 of Article I, Section 1 of Article II, the Tenth Amendment, Section 2 of the Fourteenth Amendment and the Seventeenth Amendment of the Constitution of the United States, and of the powers conferred upon the State of Texas by such provisions.

VIII.

To limit the right of suffrage to those who are 21 or older, as is done by the Plaintiff's Constitution and statutes, is a reasonable exercise of the Plaintiff's powers under the Constitution of the United States to set qualifications for voters and serves the important state interest of ensuring a mature electorate. A similar limit is imposed by 45 other states and the validity of using the age of 21 as a presumptive bench mark for entry into the franchise is explicitly recognized in Section 2 of the Fourteenth Amendment of the Constitution of the United States. By purporting to override the judgment of Plaintiff, and of 45 other states, and setting the age at 18, Congress has not exercised its powers under the Fourteenth Amendment in an appropriate manner with relation to the states.

IX.

Section 303 of the Act authorizes the Defendant, John N. Mitchell, as Attorney General of the United States, to enjoin and restrain the Plaintiff and its officials in the enforcement of the aforesaid provisions of its Constitution and statutes and to impose upon them

monetary fines and imprisonment. The Plaintiff, upon information and belief, has reason to believe and does believe that Defendant will seek to enforce all provisions of the Act against the Plaintiff and its officials.

X.

The provisions of Title III of the Act and the power conferred upon the Defendant thereunder operate to deny to Plaintiff the right to enforce provisions of its Constitution and statutes that have been duly adopted and enacted in furtherance of Plaintiff's sovereign powers and under specific authority of the Constitution of the United States and the amendments thereto. The importance of this controversy creates an urgent need for an adjudication by this Court in order to secure to Plaintiff its sovereign and constitutional powers and rights and to remove uncertainty about the validity of national, state, and local elections.

XI.

The Plaintiff, State of Texas, has no adequate remedy at law to redress the unconstitutional denial of its rights and has a constitutional and statutory right to resort to this Court to secure its rights.

WHEREFORE, Plaintiff prays:

1. That this Court take jurisdiction of the parties and subject matter of this action and by appropriate order require that Defendant answer this Complaint.

2. That a decree be entered declaring Title III of Public Law 91-285 to be unconstitutional and beyond the power of Congress.

3. That the Defendant be enjoined from taking any

action to enforce the provisions of Title III of Public Law 91-285.

4. That Plaintiff have such other and further relief as the Court may deem proper and necessary in order to secure its rights.

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ---------- ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

MOTION FOR EXPEDITED CONSIDERATION

* * *

The Plaintiff, State of Texas, respectfully moves this Court to expedite consideration of this cause and, if leave to file the Complaint is granted, to set early deadlines for the filing of the Answer by the Defendant and for the filing of briefs on the merits by the parties, and to set oral argument at an early date.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff

PROOF OF SERVICE

I, Crawford C. Martin, Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of ----------, 1970, I served the foregoing Motion for Leave to File Complaint, Complaint, and Motion for Expedited Consideration upon the Defendant by depositing a copy in the United States mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530.

CRAWFORD C. MARTIN

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 44 ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

BRIEF ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant
J. C. DAVIS
Assistant Attorney General
W. O. SHULTZ II
Assistant Attorney General
JOHN REEVES
Assistant Attorney General
Box R, Capitol Station
Austin, Texas 78711
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. ---------- ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

BRIEF ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

STATEMENT OF THE CASE

The State of Texas, as Plaintiff, seeks to invoke the original jurisdiction of the Supreme Court of the United States under Article III, Section 2 of the Constitution of the United States, and Section 1251(b)(3) of Title 28, United States Code, for the purpose of having this Court declare that Title III of Public Law 91-285, known as the Voting Rights Act Amendments of 1970, (hereinafter referred to as the Act) is unconstitutional and beyond the power of Congress and enjoining John N. Mitchell, Attorney General of the United States, from taking action against the Plaintiff or its agents and officers to enforce these provisions of the Act.

Article VI, Sections 1 and 2, Constitution of Texas, (Vernon's) and Articles 5.01 and 5.02, Texas Election

Code (Vernon's), provide, as one of the qualifications for voting in the State of Texas, that a person shall have attained the age of twenty-one years. This requirement applies to all elections: federal, state and local.

Title III of the Act provides that no citizen of the United States, otherwise qualified to vote in any state, shall be denied the right to vote in any election if they are eighteen years of age or older. The Defendant, John N. Mitchell, Attorney General of the United States, is authorized and directed to take action against Plaintiff, State of Texas, and its officers and agents to compel compliance with Title III of the Act.

In enacting Title III of the Act, Congress has exceeded the powers, either express or implied, reposed in it under the Constitution of the United States, and has usurped the power of the states to determine the qualifications of voters as provided in Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States.

Plaintiff has no other competent forum in which it may protect and preserve its Constitution and statutes from the unconstitutional enactment of Congress and the imminent and threatened enforcement of such Act by the Defendant.

I. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE ORIGINAL JURISDICTION OF THE COURT.

Article III, Section 2 of the Constitution of the United States provides in part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,

the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . to Controversies to which the United States shall be a Party;—to Controveries between two or more States;—between a State and Citizens of another State; . . .

In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. . . .

Section 1251 of Title 28, United States Code, provides in part:

§1251. Original Jurisdiction

. . .

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

. . .

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

The Plaintiff, State of Texas, is a state of the United States and the Defendant, John N. Mitchell, Attorney General of the United States, is a citizen of the State of New York. The question whether the Congress, in enacting Title III of the Act, has exceeded its constitutional powers and thereby usurped powers reposed in the states, presents conflicting claims of governmental powers with regard to the same subject matter and constitutes a controversy over whether the states or the Congress has authority under the Constitution of the United States to act in the area in question. Therefore, the action set forth in the Complaint presents both the parties and a controversy appropriate for the original jurisdiction of this Court. *South Car-*

olina v. Katzenbach, 383 U.S. 301 (1966); *United States v. California,* 332 U.S. 19 (1945); See *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945).

II. IT IS IMPERATIVE THAT THE SUPREME COURT ASSERT ITS JURISDICTION.

This is not a case where the Plaintiff state is suing on behalf of private or individual interests rather than as a sovereign, as in *New Hampshire v. Louisiana,* 108 U.S. 76 (1882) and *Massachusetts v. Missouri,* 308 U.S. 1 (1939). Nor is it a case in which the state seeks to sue as representative of its citizens, as in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). The Plaintiff here asserts rights secured to it as a sovereign state of the Union under the provisions of Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States, and protests the abridgment of those rights by the Congress through Title III of the Act.

The issue then posed is clearly a substantial one. The decisions of this Court have long held that each state has a wide scope of authority for the imposition of standards and conditions upon the right to vote. The right to vote is a privilege to be exercised as the state may direct, upon such terms as may seem proper to the state, provided there is no discrimination between individuals or classes in violation of the Constitution of the United States. As long as qualifications and conditions regarding voting are reasonable and nondiscriminatory, they are permissible. *Pope v. Williams,* 193 U.S. 621 (1904); *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45 (1959); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965).

Article I, Section 2, of the Constitution and the Seventeenth Amendment, respectively, provide for the election of members of the House of Representatives and Senate. Each provides that the "Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise Article II, Section 1 of the Constitution provides that the electors for President and Vice President shall be appointed in such manner as the legislature of each state may direct. Thus, while it may be said that the Constitution of the United States establishes and guarantees a right of suffrage with respect to these offices, it expressly adopts as the qualifications for exercising that right, those that may be established by the states. *Ex parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Classic,* 313 U.S. 299 (1940); *Drueding v. Devlin,* 234 F.Supp. 721 (D.C. Md. 1964) aff'd. 380 U.S. 125 (1965); *Gray v. Sanders,* 372 U.S. 368 (1963).

Undoubtedly the right of the states to prescribe qualifications for voting includes the right to provide a limitation upon that right based upon age. This Court has recognized age as being one of the qualifications which the states may fix with regard to voting.

> We do not suggest that any standard which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. *Residence requirements, age, previous criminal record* (Davis v. Beason, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. (Emphasis added.) *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 51 (1959).

See also *Kramer v. Union Free School District,* 395 U.S. 621, 625-627 (1969). The right of the states in this respect is also explicitly recognized in Section 2 of the Fourteenth Amendment. That section provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to *any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States,* or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. (Emphasis added.)

If it were not recognized that the states had the power to establish the age necessary for qualification as a voter, there would be no necessity for prescribing a penalty for denying the right to vote to persons who are twenty-one years of age. Even so, there is no absolute prohibition against a state establishing a voting age above twenty-one years, as long as it is willing to suffer the accompanying reduction in representation in the House of Representatives.

The power of Congress under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article" goes no further, insofar as establishment of a voting age is concerned,

than to authorize legislation to enforce the reduction in representation of those states that establish a voting age above twenty-one years. It does not authorize Congress to impose upon the states its own criteria for a maximum voting age and prescribe its own penalty for states that provide otherwise. Nor does any other provision of the Constitution of the United States give Congress such authority.

The substantiality of the constitutional question posed by this case was clearly recognized in the congressional debates that led to the adoption of Title III of the Act. The supporters of Title III, no less than its opponents, recognized that the constitutionality of a federal statute permitting persons 18 and over to vote was a debatable issue that would have to be resolved by this Court. Senator Bayh, for example, said that "* * * we must all recognize that this is a gray area. A reasonable question can be raised." 116 Cong. Rec. S3509 (daily ed. March 11, 1970). Speaker McCormick told the House:

> I realize that there are some honest differences on the constitutional question. But on that question I urge that any doubts be resolved in favor of constitutionality, because the Supreme Court is going to pass upon the question.

116 Cong. Rec. H5675 (daily ed. June 17, 1970).

Section 303(a)(2) of the Act, granting jurisdiction to three-judge district courts, is no barrier to the exercise by this Court of jurisdiction in this case. It does not even purport to give those courts exclusive jurisdiction. Even if it did, it would be ineffective. Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(b), was a deliberate attempt to channel all

litigation about that statute to the District Court for the District of Columbia, yet this did not bar this Court from exercising original jurisdiction in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). As the Solicitor General correctly said in that case, § 14(b) was "not intended to deprive this Court of jurisdiction of appropriate original actions challenging the Act's constitutionality, in view of the constitutional basis of this Court's original jurisdiction." Memorandum for Defendant at 2 n. 1, *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). There is clear evidence in the legislative history that Congress contemplated that the present statute would be tested by an original action here. See the remarks of Rep. McCulloch, 116 Cong. Rec. H5643 (daily ed. June 17, 1970), and of Rep. Bingham, quoting a letter from Professor Paul Freund suggesting such a course. Id. at H5674.

Although the jurisdiction of this Court of actions by a state against a citizen of another state is concurrent with that of the district courts, 28 U.S.C. § 1251(b)(3), and the Court therefore has discretion whether to entertain the suit, this is the kind of case that is especially appropriate for exercise of original jurisdiction. As the United States said in a similar situation:

> This is the happily rare, and indisputably momentous, situation of direct confrontation between the State and federal governments. It is, we submit, precisely for the resolution of such serious disputes that this Court's original jurisdiction * * * is most appropriately invoked.

Brief in Support of Motions for Leave to File Original Complaints at 15-16, *United States v. Alabama,* 382 U.S. 897 (1965). There are no obstacles here to the

exercise of this Court's jurisdiction. The complaint that we ask the Court's leave to file presents only questions of law. No factual issues are involved that might prove burdensome to the Court. No trial will be required and the Attorney General is the only party called upon to respond. The issue that is dispositive of this litigation is the constitutionality of Title III of the 1970 Act, a question that must reach this Court in due course and that can appropriately be resolved here in the first instance.

III. CONSIDERATION OF THIS CASE SHOULD BE EXPEDITED

Section 305 of the Act provides that the provisions of Title III shall take effect with respect to any primary or election held on or after January 1, 1971. It is imperative that the validity of Title III be resolved prior to that date in order to avoid what Representative Celler described as "calamity and chaos in our electoral process." 116 Cong. Rec. H5642 (daily ed. June 17, 1970). See also id. at H5643 (Rep. Railsback), 5643 (Rep. McCulloch), 5673 (Rep. Robison), and 116 Cong. Rec. S3491 (daily ed. March 11, 1970) (Sen. Cook).

To that end Plaintiff urges that this Court grant leave to file the Complaint as soon as the Court's processes permit and that, if leave is granted, it fix dates for filing of briefs on the merits and oral arguments that will permit prompt disposition of the case.

CONCLUSION

The question presented in this case is of national concern and affects all of the states. It is imperative that this Court take jurisdiction and grant Plaintiff's

Motions for Leave to File Complaint and for Expedited Consideration in order that Plaintiff's rights may be preserved and protected.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

JOHN REEVES
Assistant Attorney General
Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705
Attorneys for Plaintiff

PROOF OF SERVICE

I Crawford C. Martin, Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of ----------, 1970, I served the foregoing Brief on Motion for Leave to File Complaint upon the Defendant by depositing a copy in the United States mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530.

CRAWFORD C. MARTIN

APPENDIX A

Relevant Provisions of the Constitution of Texas and Texas Statutes

ARTICLE VI, CONSTITUTION OF TEXAS

§1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§2. Qualified elector; registration; absentee voting

Sec. 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and

eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01 Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.

2. Idiots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Art. 5.02 Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, in-

cluding general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

APPENDIX B

Relevant Provisions of the Statutes and Constitution of the United States

PUBLIC LAW 91-285

TITLE III — REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

DECLARATION AND FINDINGS

Sec. 301.(a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

ENFORCEMENT

Sec. 303.(a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

DEFINITION

Sec. 304. As used in this title the term "State" includes the District of Columbia.

EFFECTIVE DATE

Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice

President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such

State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL, OF THE UNITED STATES, DEFENDANT

No. 44, Original

STATE OF TEXAS, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL, OF THE UNITED STATES, DEFENDANT

MEMORANDUM FOR THE DEFENDANT

These actions, essentially identical in nature, challenge the constitutionality of the federal statute which reduces the voting age to 18, Title III of the Voting Rights Act Amendments, Public Law 91-285, 84 Stat. 318. Each of the plaintiffs seeks to invoke the original jurisdiction of this Court under Article III, Section 2 of the United States Constitution; see

401-680—70

28 U.S.C. 1251(b)(3). Their respective motions for leave to file complaints and allied documents were filed on August 3, 1970.

1. The United States submits that the motions for leave to file should be granted. The basic issue raised by these suits—the validity of Title III—is one of the questions presented by *United States* v. *Arizona*, No. 46, Original, and *United States* v. *Idaho*, No. 47, Original. The Attorney General of the United States has asked leave to institute suit in this Court in these two actions to enforce compliance with various provisions of the Voting Rights Act Amendments of 1970.[1] The controversies between the United States and each of the four states exist because of the refusal of the states to accept, absent binding adjudication, the supremacy of the federal statute. In our view, the four cases should be heard together to enable this Court to consider at one time the validity of the related voting reforms adopted by Congress in the 1970 law.

In the brief in support of both our motions for leave to file original complaints and our related motions against Arizona and Idaho, we set forth arguments similar to and, in some respect identical to, those made by the States of Oregon and Texas. We respectfully

[1] *United States* v. *Arizona* involves both Title III and Section 201 of the Amended Act. Section 201 suspends the use of literacy and other voting tests in states and counties not subject to suspension under Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973b(a). *United States* v. *Idaho* involves, in addition to the voting age issue, Section 202 of the Amended Act, which eliminates durational residency requirements with respect to voting for president and vice president and establishes uniform standards as to absentee registration and balloting in presidential elections.

refer the Court to pages 5–17 of our joint brief in those two cases.[2]

2. Expedited consideration of the present actions would be highly desirable. See our motions to expedite and pages 17–20 of our supporting brief in the *Arizona* and *Idaho* cases. As we suggest there, plaintiffs in all four cases should submit their respective briefs on the merits by September 10, 1970, with defendant's briefs to be filed by October 5. In that way, should the Court grant the motions for leave to file the complaints when it reconvenes in October, the cases could be heard together at the October argument session.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

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[2] We are supplying Oregon and Texas with copies of our motions, complaints and supporting brief in the *Arizona* and *Idaho* cases.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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Supreme Court, U.S.
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E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 and 47, Original

STATE OF OREGON, *Plaintiff*,

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant*.

STATE OF TEXAS, *Plaintiff*,

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant*.

UNITED STATES, *Plaintiff*,

—v.—

STATE OF ARIZONA, *Defendant*.

UNITED STATES, *Plaintiff*,

—v.—

STATE OF IDAHO, *Defendant*.

MOTION TO INTERVENE BY NEW YORK CITY BOARD OF ELECTIONS IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1970

J. LEE RANKIN
Corporation Counsel
Attorney for
New York City Board of Elections
Office & P. O. Address
Municipal Building
Borough of Manhattan
City of New York 10007

NORMAN REDLICH
LEONARD BERNIKOW
PAULA OMANSKY
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 and 47, Original

STATE OF OREGON, *Plaintiff*,

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant*.

STATE OF TEXAS, *Plaintiff*,

—v.—

JOHN N. MITCHELL,
Attorney General of the United States, *Defendant*.

UNITED STATES, *Plaintiff*,

—v.—

STATE OF ARIZONA, *Defendant*.

UNITED STATES, *Plaintiff*,

—v.—

STATE OF IDAHO, *Defendant*.

MOTION FOR LEAVE TO INTERVENE BY NEW YORK CITY BOARD OF ELECTIONS

1. The New York City Board of Elections moves to intervene as defendant in Nos. 43 and 44 of the above-captioned cases in support of the constitutionality of Title III of the Voting Rights Act Amendments of 1970, which confers the right to vote on citizens between the ages of 18-21. Even though all of the above-captioned actions raise in some form the question of the constitutionality of Title III, the Board intervenes only in Nos. 43 and 44 because the Board's interest is to defend the constitutionality of

the federal statute. The affirmative duty to enforce the statute lies with the Attorney-General and forms the basis of Nos. 46 and 47 in which the Board of Elections has not moved to intervene. Moreover, intervention by the Board of Elections as a defendant removes any questions which might be raised under the Eleventh Amendment, since that Amendment prohibits a suit against a state by citizens of another state and does not deal with suits brought by a state itself.

2. The original cases, consolidated for hearing by this Court on October 19, 1970, test the constitutionality of the Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314 (1970). In *Oregon* v. *Mitchell*, No. 43 Original, and *Texas* v. *Mitchell*, No. 44 Original, the states are asserting the invalidity of Title III of the Amendments. In *United States* v. *Arizona*, No. 46 Original, and *United States* v. *Idaho*, No. 47 Original, the Government seeks to compel those states to comply with Title I, II and III of the Amendments. Title I eliminates literacy tests in counties where less than 50% of the persons of voting age residing therein were registered on November 1, 1968, or voted in the Presidential election of November, 1968. Title II abolishes the durational residency requirement as a precondition to voting for electors for President and Vice-President.

3. Pursuant to Rule 9(2) of the rules of this Court, the Federal Rules of Civil Procedure are to be applicable in original actions in this Court where appropriate. Rule 24 of the Federal Rules of Civil Procedure provides for "Intervention of Right" when

1. The applicant has an interest in the subject matter of the action;

2. An adverse decision will as a practical matter impair or impede the intervenor's ability to protect that interest;

3. The intervenor's interest will not adequately be represented by the existing parties.

Applicant for intervention, New York City Board of Elections, maintains that it meets all three requirements for intervention of right and, on this basis, respectfully requests leave of this Court to intervene in the original cases pending before the Court.

4. Applicant, as a party to a pending suit which challenges the validity of the Voting Rights Act Amendments of 1970, has an interest in the subject matter of the original actions. The New York City Board of Elections and Attorney General John N. Mitchell have been named as parties defendants in an action pending before the District Court of the District of Columbia [*Christopher, et al.* v. *Mitchell, et al.*, Civil Action No. 1862-70 (D.C.D.C.)]. That case challenges the validity of Titles I, II, and II of the Voting Rights Act Amendments of 1970, and, in relevant part, asserts that Title III renders unenforceable New York State constitutional and statutory provisions (Art. II, § 1 of the State Constitution and § 150 of the Election Law) which prescribe the voting age to be 21 years. The New York City Board of Elections had announced that it intended to comply with the federal legislation lowering the voting age to 18 years notwithstanding the conflict with the New York State constitutional and statutory provisions setting the voting age at 21.

5. Issue has been joined in the District Court action. Both defendants Mitchell and the New York City Board of Elections have moved for summary judgment. Argument

has been scheduled before a three judge federal panel on September 10, 1970. As a party to a pending suit which challenges the validity of Titles I, II and III of the Voting Rights Act Amendments of 1970, the identical issues presented before this Court, the interest of the New York City Board of Elections is clear.

6. The Supreme Court will decide the validity of the Voting Rights Act Amendments of 1970 in the original actions presently before it. New York* will be bound by this decision. In a real sense, New York thus meets the requirements of Rule 24 prior to the 1966 amendments of that Rule, ". . . the applicant is or may be bound by a judgment in the action." The practical effect on New York is that any appeal from the District Court's possible adverse decision in the pending case is foreclosed if this Court decides adversely to the Attorney General. New York is thus denied the opportunity to protect its interest in a suit which it has been compelled to defend. In the words of Rule 24 as amended, the "disposition of the action may as a practical matter impair or impede his ability to protect" the applicant's interest.

7. New York's interest is not adequately represented by the existing parties.

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* While all states will be equally bound, New York's special interest derives from its being named a party defendant in the District Court suit presently pending. The Attorney General has recently brought suit against New Hampshire and North Carolina to force compliance with the Amendments. As reported in the New York Times, August 20, 1970, these suits were brought to "assure court consideration at lower levels if the Supreme Court should refuse to accept the Arizona and Idaho cases . . . The Justice Department strategy was to have the constitutionality of the law tested in the Supreme Court . . ." Presumably, these suits, unlike the suit against New York, will be stayed on motion of the Attorney-General.

a. The Attorney General argues that § 5 of the Fourteenth Amendment gives to Congress the power to override state laws setting the voting age at 21 in the absence of a judicial determination that the state law is invalid. The Attorney General does not raise the issue of whether state laws which set the voting age at 21 are constitutional in the absence of Congressional legislation (see Memorandum in Support of Motion of Defendant John N. Mitchell attached hereto). Furthermore, the Justice Department has indicated to counsel for the New York City Board of Elections that the brief before the Supreme Court will be substantially the same as the one submitted in the District Court action in which the New York City Board of Elections has been named a party defendant. Finally, it is widely believed that the Attorney General takes the position that state laws setting the voting age a 21 *are* constitutional in the absence of Congressional enactment of legislation lowering the voting age.

b. The New York City Board of Elections, while agreeing with the arguments advanced by the Attorney General in support of the Amendments, adopts a broader position. In its brief in the District Court action, the Board contends that the provisions of the New York Constitution and Election Law which set the voting age at 21 create arbitrary and invidious classifications in violation of the Equal Protection Clause of the Fourteenth Amendment. Thus, it is argued, the action by Congress is justified to correct a law which was unconstitutional in the absence of the new legislation.

c. Accordingly, if this Court rejects the sole argument advanced by the Attorney General, this Court can uphold the Amendments on the ground that state laws setting the voting age at 21 are, in fact, unconstitutional. This is the second prong of the New York City Board of Election's

argument. The Attorney General has not, and, presumably, will not make this argument. In this motion to intervene, New York seeks the opportunity to raise all the constitutional arguments in favor of the legislation and we herewith respectfully submit a brief to be considered by the Court if the motion to intervene is granted.

d. Thus, the Attorney General does not adequately represent those states which intend to comply with the Voting Rights Act Amendments of 1970 but which go a step further to maintain that laws setting the voting age at 21 are unconstitutional. "... Interests need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse* v. *Camp*, 385 F. 2d 694, 703 (D.C. Cir. 1967). New York has an interest which, though not wholly adverse to that of the United States Government's in the pending original cases, presents a basis for concluding that the existing representation is inadequate.

8. The New York City Board of Elections has demonstrated a compelling and abiding interest in upholding Congress' power to expand the franchise. The Board of Elections was named a defendant in *Morgan* v. *New York City Board of Elections*, the companion case to *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) which, it is believed, will be controlling as to the issues in the cases before this Court. In *Morgan*, New York argued that Section 4(e) of the Voting Rights Act of 1965 was appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. There, too, the legislation conflicted with the New York requirement of literacy in English.

The Board of Election had challenged the constitutionality of the 21 year old voting requirement, even before Congress acted. In *WMCA Vote at 18 Club* v. *Board of*

Elections, Civil No. 70-1814 (S.D.N.Y., June 23, 1970), a case which raised the issue of the constitutionality of the provisions of New York's laws setting the voting age at 21, the New York Board of Elections, though named a defendant, asserted the position that such laws violated the Equal Protection Clause of the Fourteenth Amendment.

Applicant for intervention respectfully requests this Court to consider the New York City Board of Election's proven interest and experience in litigation in the very issues which are the subject matter of the present cases in determining whether to permit the New York City Board of Elections to intervene.

CONCLUSION

The New York City Board of Elections has an interest in the subject matter of the original action, the Voting Rights Act Amendments of 1970, because it is a party to a pending suit which challenges these same Amendments; as a practical matter, the Board will be bound by this Court's disposition of these actions; and applicant's interest will not adequately be represented by the existing parties. "... (T)he just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court." *United States* v. *Louisiana,* 354 U.S. 515, 515-516 (1957). The New York City Board of Elections respect-

fully requests permission to intervene as a defendant in Nos. 43 and 44, Original.

September 4, 1970

Respectfully submitted,

J. Lee Rankin
Corporation Counsel
Attorney for Applicant
for Intervention,
New York City Board of Elections
Municipal Building
New York, N. Y. 10007
212-566-4517

Norman Redlich
Paula J. Omansky
Of Counsel

EXHIBIT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1862-70

FREDERICK J. CHRISTOPHER, JR., *et al.*,

Plaintiffs,

v.

JOHN N. MITCHELL, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT JOHN N. MITCHELL

JERRIS LEONARD
Assistant Attorney General

DAVID L. NORMAN
Deputy Assistant Attorney General

DAVID B. MARBLESTONE
JEREMY I. SCHWARTZ
Attorneys
Department of Justice
Washington, D. C. 20530

Attorneys for Defendant
John N. Mitchell

THOMAS A. FLANNERY
United States Attorney

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In the United States District Court

For the District of Columbia

Civil Action No. 1862-70

Frederick J. Christopher, Jr., *et al.*,

Plaintiffs,

v.

John N. Mitchell,
as Attorney General of the United States, *et al.*,

Defendants.

Memorandum in Support of Motion of Defendant John N. Mitchell

This suit was commenced by plaintiffs, five New York City residents who are registered voters, on June 23, 1970. The defendants are the New York City Board of Elections and John N. Mitchell, Attorney General of the United States. Plaintiffs challenge the constitutionality of four portions of the Voting Rights Act Amendments of 1970.

Defendant John N. Mitchell has filed a motion for sum-judgment as to counts 1 to 6 of the complaint and for dismissal (or alternatively summary judgment) as to counts 7 and 8. This memorandum is submitted in support of that motion.

I. Statement

The Voting Rights Act Amendments of 1970, Public Law 91-285, 84 Stat. 314, were signed by the President

on June 22, 1970.[1] The new law extends for five years operation of section 4(a) of the Voting Rights Act of 1965, the provision whose primary effect was to suspend the use of literacy tests in six southern states and part of a seventh state. Also, the 1970 Amendments add two new titles to the Voting Rights Act. Title II contains provisions which (1) suspend the use of literacy tests in all states and counties not already subject to suspension by virtue of the 1965 Act and (2) abolish durational residency requirements with respect to voting for President and Vice President. Title III, the other title added by the 1970 law, reduces to 18 the minimum age for voting in all elections. Another provision of the new statute makes section 4(a) of the Voting Rights Act applicable to literacy-test jurisdictions determined to be within a coverage formula based upon participation in the 1968 presidential election.

The present suit attacks the validity of the provisions regarding suspension of tests (section 201 of the Voting Rights Act as amended),[2] elimination of durational residency requirements (section 202), reduction of voting age (section 302) and use of the 1968 coverage formula (section 4). Plaintiffs seek declaratory and injunctive relief against enforcement of the challenged portions of the statute.

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[1] A copy of this statute is included in the Appendix (hereafter referred to as "Ap."), p. 1. Also included are certain of the sections of the Voting Rights Act of 1965, Ap., p. 7.

[2] The term "Voting Rights Act as amended" refers to the 1965 Act as amended by the 1970 law.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The jurisdiction of this Court is invoked on the basis of section 14(b) of the Voting Rights Act.[3] This provision was the basis for a suit, similar in nature to the present one, which was brought in this Court and which attacked section 4(e) of the 1965 Act. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 645-646 (1966).[4] Considering the policy underlying section 14(b), that is, confining specialized litigation to a single tribunal,[5] it seems clear that section 14(b) applies to suits challenging the amendments to the Voting Rights Act of 1965, as well as to suits concerning the original provisions of the 1965 Act.[6]

Defendant John N. Mitchell does not dispute the standing of plaintiffs to bring the causes of action set forth in counts

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[3] Section 14(b), 79 Stat. 445, 42 U.S.C. 1973*l*(b) (Supp. V, 1965-69), provides as follows:

> *No court other than the District Court for the District of Columbia* or a court of appeals in any proceeding under section 9 *shall have jurisdiction to issue* any declaratory judgment pursuant to section 4 or section 5 or *any restraining order or* temporary or permanent *injunction against the execution or enforcement of any provision of this Act* or any action of any Federal officer or employee pursuant hereto. (Emphasis supplied.)

[4] See also *O'Keefe* v. *New York City Bd. of Elections*, 246 F. Supp. 978 (S.D.N.Y., 1965), where the court held that, under section 14(b), the United States District Court for the District of Columbia had exclusive jurisdiction over actions to enjoin enforcement of provisions of the Voting Rights Act.

[5] *Cf.* the discussion of section 14(b) in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).

[6] Cf. 116 Cong. Rec. 3288-92 (daily ed., March 9, 1970), where the Senate rejected an amendment which would have granted the local federal district courts (rather than the District Court for the District of Columbia) jurisdiction over actions brought under sections 4 and 5 of the Voting Rights Act.

1 to 6 of the complaint.[7] Plaintiffs assert that enforcement of the various statutory provisions in regard to the State of New York would have the effect of diluting their votes. The same theory of standing was utilized in and was sustained in the *Morgan* case. See 247 F. Supp. 196, 198 (D.D.C., 1965), *rev'd on other grounds,* 384 U.S. 641 (1966).

Moreover, except with respect to plaintiffs' challenge to the 1968 coverage formula (section 4(b) of the Voting Rights Act as amended),[8] the case is ripe for adjudication. Section 201, pertaining to suspension of literacy tests, took effect immediately upon enactment, *i.e.*, on June 22, 1970. Section 202, concerning residency requirements, relates only to presidential elections. However, well before the 1972 election, the states must implement section 202 by bringing state laws into conformity with it and by establishing proper registration practices. It seems clear that there is valid controversy at present. *Cf. Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969);[9] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 536 (1925). Should adjudication be delayed, there is little or nothing that the litigants on either side could add with

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[7] However, as explained *infra*, in part E of the Argument, we maintain that plaintiffs' attack upon use of the 1968 coverage formula should be dismissed, on the ground that the provision in question has not been determined to be applicable to New York County.

[8] This matter—the prematurity of plaintiffs' attack upon the amendment to section 4 of the Act—is discussed *infra* in part E of the Argument.

[9] In *Moore* v. *Ogilvie, supra*, a suit challenging an Illinois statute regarding nomination of independent candidates for the offices of electors of President and Vice President, the Court held that a justiciable controversy was presented, despite the fact that the 1968 presidential election had passed. The Court noted that the statute would control future elections.

regard to the power of Congress to adopt section 202. On the other hand, judicial determination now of the validity of the statute will benefit the states and all others concerned.

Title III, which lowers the voting age, is to take effect with respect to any primary or election held on or after January 1, 1971. See section 305, 84 Stat. 319. To comply with the mandate that 18-year-olds be permitted to vote in any election held in 1971, the states may be required to begin registering such persons during 1970, at least after completion of this year's elections. In any event, the analysis made above with regard to section 202 shows that there is a valid controversy at present and that prompt adjudication is essential to avoid the possibility that the legality of elections held in 1971 will be thrown into question.

II. Questions Presented

The basic issue presented is whether Congress had authority to adopt the challenged provisions of the Voting Rights Act Amendments of 1970.[10] The specific questions raised are as follows:

(1) whether Congress had authority to enact section 201 concerning suspension of tests;

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[10] As noted above, plaintiffs are residents of the State of New York. This memorandum is not limited to the effects which the 1970 Amendments have upon New York, but deals with the over-all purpose and effect of the legislation.

Certain of the provisions, i.e., section 202 and Title III, apply to the District of Columbia, as well as to the states. With respect to the District of Columbia, there can be no dispute as to the power of Congress to legislate in regard to voting rights. United States Constitution, Article I, section 8.

(2) whether Congress had authority to adopt the provisions of section 202 eliminating durational residency requirements in presidential elections;

(3) whether Congress had authority to enact section 302 which reduces voting age; and

(4) whether plaintiffs' attack upon the 1968 coverage formula (sections 4 and 5) is premature or, in the alternative, whether that attack is without merit.

III. Summary of Argument

A. The Fifteenth Amendment, which prohibits denial of the right to vote on account of race, and the Fourteenth Amendment, which forbids denial of the equal protection of the laws, limit the authority of the states to establish qualifications for voting. Furthermore, each of the Amendments empowers Congress to implement its provisions by means of appropriate legislation.

The Supreme Court has held that, in exercising the authority granted by the Fourteenth and Fifteenth Amendments, Congress has broad discretion to determine the need for corrective legislation and the type of remedies which are appropriate. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). The power of Congress to prevent enforcement of a state law restricting suffrage is not confined to situations in which the state law would be held by a court to be unconstitutional. *Katzenbach* v. *Morgan, supra.* The question in such a case involving federal legislation which overrides state voting qualifications is not whether the state laws are nullified by the Fourteenth or Fifteenth Amendment itself, but whether the federal statute is "appropriate

legislation" within the meaning of the *McCulloch* v. *Maryland* standard. In *Katzenbach* v. *Morgan, supra*, the Court held that an act of Congress implementing the Equal Protection Clause is to be sustained if the judiciary can "perceive a basis" for the legislation.

The several provisions of the Voting Rights Act Amendments at issue in the present case differ in terms of subject matter, but essentially the same legal theory underlies each part of the statute. That is, in each instance, Congress determined that no "compelling state interest" [see *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969)] warranted the disfranchisement resulting from the affected state qualifications and that, for this and other reasons, such restrictions on the franchise constituted invidious discrimination. The congressional findings were proper and are entitled to acceptance by the Court. At the very least, the provisions of the federal statute are sustainable on the ground that bases for them can be perceived. *Katzenbach* v. *Morgan, supra.*

B. The suspension of tests effected by section 201 of the Voting Rights Act as amended is authorized by both the Fourteenth and Fifteenth Amendments.

First, Congress properly determined that such suspension (affecting primarily states in the Northeast and the West) was necessary to remedy the discriminatory effects which literacy requirements have upon Negroes, Mexican-Americans and other minorities. Congress utilized the rationale of *Gaston County* v. *United States*, 395 U.S. 285 (1969), the case holding that a literacy test, regardless of whether it is administered impartially, has racially discriminatory effect when applied to Negroes who were lim-

ited to inferior, segregated schools. The Court stated in *Gaston County* that its ruling as to the inequity of imposing literacy requirements upon persons denied equal educational opportunity applied, regardless of whether such denial was caused by the government seeking to use the literacy test or by some other government.

Congress had an ample basis for utilizing the *Gaston County* rationale with respect to states other than those, in the southern and border regions, which had de jure school segregation. Over the past several decades, millions of Negroes migrated from the South to the other sectors of the United States. Moreover, as a result of racial isolation and related conditions, denial of equal educational opportunity has occurred in all parts of the country, including the northeastern and western literacy-test states.

Congress had, in addition to the facts supporting use of the *Gaston County* principle, other substantial evidence that the impact of literacy tests falls disproportionately upon minority groups and the poor.

Secondly, it was within congressional discretion to determine, as Congress did, that no interest of the state was sufficient to justify disfranchisement of persons unable to read and write. It was pointed out, for example, that, with the extensive news coverage afforded by radio and television, one need not be able to read in order to be adequately informed. Especially significant in regard to assessing state interest is the fact that most states have never made literacy a precondition for voting.

Accordingly, Congress had a firm basis for suspending, until August 6, 1975, the use of tests and devices in all states and counties not already subject to suspension by virtue of the 1965 Act.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

C. Section 202, concerning durational residency requirements in regard to voting for President and Vice President, is a proper means of implementing the Fourteenth Amendment.

Under section 202, any otherwise qualified person who has resided in a state or political subdivision for at least 30 days prior to a presidential election must be treated as eligible to vote there in such election. A person who changes his residence within 30 days of the election and who is ineligible to vote in his new location is to be allowed to vote for President and Vice President, by absentee ballot or in person, in the place from which he moved.

The effect of these provisions is to remedy a situation in which, because of state and local durational requirements (ranging as high as one or even two years) imposed by various states, several million citizens have been prevented from voting in presidential elections.

Congress determined that, with respect to voting for President and Vice President, no compelling interest of a state warranted the imposition of lengthy residence requirements. The notion that voters must be familiar with local conditions and issues does not apply to voting in a presidential election, and it is clear that citizens may not be disfranchised because of the way they might vote. *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Nor do the logistical needs of the states justify requiring periods of residence, in the state or locality, in excess of 30 days. The provisions of the federal statute are based upon practices already used in some states and thus have been shown to be workable. 116 Cong. Rec. 3539 (daily ed., March 11, 1970) (statement of Senator Goldwater).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

With regard to prevention of double voting and other fraudulent practices, methods of safeguarding the integrity of the electoral process—short of wholesale disfranchisement of person who move—are available to the states. The federal statute itself prescribes criminal sanctions for false registration and other fraudulent acts.

In short, section 202 is a valid means of remedying the effects of state laws which deprive large numbers of citizens of the right to vote in a presidential election, merely because they moved within a state or from one state to another. Certainly, the Court can find a rational basis for the measures adopted by Congress. *Katzenbach* v. *Morgan, supra.*

D. Title III, which reduces voting age to 18, is a proper exercise of the power of Congress to implement the Equal Protection Clause.

An analysis similar to that employed by Congress with regard to literacy and residency requirements was used with respect to the matter of voting age. In 46 states, the minimum age for eligibility to vote is 21. The prescribed age is 18 in two states, 19 in one and 20 in one.

In adopting Title III, Congress considered, on the one hand, the needs and interests of persons aged 18, 19 and 20 and, on the other, interests of the states in restricting suffrage to persons 21 and older. Thorough debate took place on the question of the maturity of the 18 to 21 age group, as well as on the propriety of reducing voting age by statute. Congress concluded that citizens between 18 and 21 were sufficiently mature to be entitled to vote; that, in view of the absence of any compelling state interest, disfranchisement of that group contravened the guarantees of the Fourteenth Amendment and that correction by statute was necessary and proper.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

The legislative record supports the action of Congress. It was shown that the vast majority of persons between 18 and 21 have completed high school and that, as a general matter, their educational level is significantly higher than that of previous generations. Also, Congress had evidence that men and women now reach physical and mental maturity several years earlier than was the case, *e.g.*, 100 years ago. Other indications of the responsibility of persons aged 18, 19 and 20 included their high degree of participation in the labor force and the fact that many of them are married and raising families.

Furthermore, the experience in Georgia and Kentucky, where 18-year-olds have been eligible to vote for many years, demonstrated that such persons are fully capable of taking part in and contributing to the electoral process.

Congress also relied upon the obligations which the governments place upon persons between 18 and 21, particularly the national defense responsibilities. In light of the fact that men included in that age group are the persons affected most directly by the draft and that a substantial perecentage of the members of the armed forces is attributable to the 18-to-21 category, Congress was fully warranted in determining that such persons should be allowed to vote for the officials who determine selective service and defense policies.

Applying the standards of *Katzenbach* v. *Morgan, supra,* it follows that Title III is appropriate legislation enforcing the Fourteenth Amendment and that it supersedes conflicting state laws, irrespective of whether a court would be required to hold unconstitutional denial of the vote to persons between 18 and 21. Considering the special competence of Congress with regard to evaluating "matters of

popular political participation" [see *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 670 (dissenting opinion)] and the substantial legislative record supporting Title III, acceptance by the Court of the congressional findings as to deprivation of equal protection would be entirely in order. Alternatively, if the Court applies the more limited standard of judicial review expressed by the majority in *Katzenbach* v. *Morgan*, Title III is readily sustainable; for, without question, the Court can "perceive a basis" for the federal statute.

E. No justiciable controversy is presented in regard to the amendments to sections 4 and 5 of the Voting Rights Act; and, in any event, plaintiffs' attack upon those provisions is without merit.

These amendments will have the effect of bringing within the scope of subsection 4(a), regarding suspension of tests, states and counties (not already subject to the 1965 Act) which maintained a voting "test or device" in November 1968 and with respect to which the Director of the Census determines that less than 50 percent of the voting-age population was registered for or voted in the 1968 presidential election. The determinations of the Census Bureau have not been made and will not be made until population data from the 1970 census is available. Accordingly, neither New York County nor any other jurisdiction has been determined to be within the scope of the 1970 amendments to section 4 or section 5.[11] It follows that plaintiffs' attempt to challenge those provisions is premature. Further-

[11] The applicability of section 5 to a state or county is dependent upon the jurisdiction's being covered by subsection 4(a). Section 5 does not apply to states or counties whose suspension of tests is based upon section 201.

more, in *South Carolina* v. *Katzenbach, supra,* the Supreme Court upheld the validity of subsection 4(b) and section 5. That decision supports the validity of the amendments to those provisions.

Our conclusion is that summary judgment for defendant Mitchell should be entered with regard to plaintiffs' attack upon section 201, section 202 and Title III. The attack upon sections 4 and 5 as amended should be dismissed or, in the alternative, summary judgment in favor of defendant Mitchell should also be granted in regard to that part of the suit.

IV. ARGUMENT

A. *The Fourteenth and Fifteenth Amendments authorize Congress to remedy unwarranted restrictions on the right to vote.*

1. Both the Fifteenth Amendment, which provides that the right to vote shall not be abridged on account of race, color, or previous condition of servitude, and the Fourteenth Amendment, which forbids the states to deny persons within their jurisdiction of the equal protection of the laws, limit the power of the states to establish qualifications for voting. For, notwithstanding plaintiffs' assertion to the contrary, it is settled that, just as the Fifteenth Amendment prohibits racially discriminatory abridgment of the franchise, the Fourteenth Amendment prohibits restrictions on the right to vote which violate the Equal Protection Clause.[13]

[13] The courts have struck down, on the ground of inconsistency within the Equal Protection Clause, a variety of limits on the right to vote. See, *e.g., Baker* v. *Carr,* 369 U.S. 186 (1962) and *Reynolds* v. *Sims,* 377 U.S. 533 (1964) (improper apportionment of legisla-

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

Each of the Amendments empowers Congress to enforce its provisions by "appropriate legislation." See Fifteenth Amendment, section 2 and Fourteenth Amendment, section 5. The nature of the congressional authority was considered by the Supreme Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) and *Katzenbach* v. *Morgan, supra*, both of which are pertinent to issues raised in the present case.

In *South Carolina* v. *Katzenbach*, the Court upheld the constitutionality of provisions of the Voting Rights Act of 1965, including subsection 4(a) which suspended the use of tests in states and counties which came within a specified coverage formula.[13]

Regarding the authority of Congress, the Supreme Court stated (383 U.S. at 326-327):

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

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tures); *Carrington* v. *Rash*, 380 U.S. 89 (1965) (disfranchisement of persons in military service); *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax in state elections); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) and *City of Phoenix* v. *Kolodziejski*, 38 Law Week 4596 (June 23, 1970) (property and other qualifications regarding special elections); *Moore* v. *Ogilvie, supra*, and *Williams* v. *Rhodes*, 393 U.S. 23 (1968) (burdens placed upon independent candidates or third parties); and *Evans* v. *Cornman*, 38 Law Week 4511 (June 16, 1970) (disfranchisement of persons living on federal enclave).

[13] Subsection 4(a), 42 U.S.C. 1973b(a) (Supp. V). The coverage formula is set forth in subsection 4(b), 42 U.S.C. 1937b(b) (Supp. V).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

• • •

We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashionng specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. • • •

Similar reasoning was utilized in *Katzenbach* v. *Morgan*, where the Court held subsection 4(e) of the Voting Rights Act of 1965[14] to be a proper exercise of the power granted Congress by section 5 of the Fourteenth Amendment. The Court expressly rejected the view that congressional authority, under section 5, to prohibit enforcement of a state law, was restricted to situations where a court had found or would find the state law to be unconstitutional. The majority stated the following (384 U.S. at 648-649):

Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex parte Virginia*, 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is

[14] Subsection 4(e), 42 U.S.C. 1973(e) (Supp. V), is the provision which in effect prohibited the application of English language literacy tests to persons educated in Puerto Rico.

authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the Congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U.S. 261, 282-284.

Thus our task in this case is not to determine whether the New York English literacy requirement as applied . . . [to persons educated in Puerto Rico] violates the Equal Protection Clause. * * * [The question before the Court is:] Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? * * * [Footnotes omitted.]

The Court held (384 U.S. at 650) that, in determining whether federal legislation based upon the Fourteenth Amendment is "appropriate," the applicable standard is that set forth in *McCulloch* v. *Maryland*—the same test relied upon, in regard to the Fifteenth Amendment, in *South Carolina* v. *Katzenbach, supra.*

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In *Katzenbach* v. *Morgan*, the Court stressed the affirmative role which Congress has with respect to making effective the guarantees of the Fourteenth Amendment. Section 5 was described (384 U.S. at 651) as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." [15]

In *Katzenbach* v. *Morgan*, the Court considered two bases for subsection 4(e). The first was to enable Puerto Ricans in New York and the other states to obtain, through increased voting strength, nondiscriminatory treatment in public services (e.g., schools). The Court stated that it was for Congress to weigh the various conflicting considerations, including alternative means of remedying discrimination in governmental services, and to determine whether subsection 4(e) was needed to further the aim of the Equal Protection Clause. As to judicial review, "It is enough that . . . [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

The same approach—granting deference to the congressional judgment—was used in regard to the second basis

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[15] It should be noted that the Court added the following (384 U.S. at 651, footnote 10):

> . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. Thus, for example, an enactment authorizing the State to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

for subsection 4(e), *i.e.*, elimination of invidious discrimination in establishing voter qualifications. After referring to the fundamental importance of the right to vote, on the one hand, and possible interests of the state in requiring English literacy on the other, the majority opinion[16] said (384 U.S. at 655-656):

> Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting . . . to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that . . . [the New York requirement violated the Equal Protection Clause]. [Footnote omitted.]

The foregoing analysis of Congress' role in determining whether limitations on the right to vote are consistent with the Equal Protection Clause is directly pertinent to the present case.

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[16] Two members of the Court dissented in *Morgan*. See 384 U.S. at 659. While they differed with the majority with respect to such matters as the adequacy of the legislative record in the particular case, the dissenting justices recognized that (384 U.S. at 668):

> Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. [Footnote omitted.]

In effect, therefore, all members of the Court agreed that congressional findings in the area of equal protection, including in particular "matters of popular political participation" (384 U.S. at 670), are to be given substantial weight by the judiciary.

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However, before turning to the specific statutory provisions at issue here, further consideration should be given to the equal-protection standard used by the judiciary—and by Congress—in testing the validity of state laws restricting the franchise.

The courts have emphasized repeatedly the critical importance of the right to vote. For example, in *Evans* v. *Cornman, supra,* 38 Law Week at 4512, the Court stated: "... the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges." See also, *e.g., Reynolds* v. *Sims, supra,* 377 U.S. at 562.

Consequently, state laws limiting the right to vote are subjected to a stricter test than are laws affecting other areas (such as economic regulation). The special scrutiny applied in cases involving voting rights was explained as follows in *Kramer* v. *Union Free School District,*[17] *supra,* 395 U.S. at 626-628:

> This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

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[17] The statute at issue in *Kramer* v. *Union Free School District, supra,* limited eligibility to vote in school district elections in certain New York school districts to citizens who were (1) residents of the district, (2) at least 21 years of age and (3) either the owners (or lessees) of real property within the district or the parents of children enrolled in the public schools. No issue was raised as to the residency or age qualifications. The additional requirements—(3) above—were challenged and were held to be unconstitutional. 395 U.S. at 623, 633.

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* * * Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash, supra,* at 96.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. *See Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [Footnotes omitted.]

See also, *e.g., Cipriano* v. *City of Houma, supra,* 395 U.S. at 706; *Evans* v. *Cornman, supra,* 38 Law Week at 4597; *City of Phoenix* v. *Kolodziejski, supra,* 38 Law Week at 4512.

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While *Kramer* and the related cases did not involve the question of congressional implementation of the Equal Protection Clause, Congress in enacting the Voting Rights Act Amendments was warranted in adopting the principle that state restrictions on the right to vote must be grounded on more than a merely "rational basis." *Katzenbach* v. *Morgan, supra,* 395 U.S. at 656. Congress examined the state voter qualifications affected by the 1970 Amendments and found, in each instance, that no "compelling state interest" justified the disfranchisement resulting from the state laws. As will be shown, these congressional findings and the other findings underlying the 1970 statute were fully supported by the legislative record; and the corrective measures adopted by Congress were proper means of effectuating the guarantees of the Fourteenth and Fifteenth Amendments.

B. *The suspension of tests effected by section 201 is a valid exercise of the power of Congress to implement the Fourteenth and Fifteenth Amendments.*

1. Section 201 of the Voting Rights Act as amended, 84 Stat. 315, suspends, until August 6, 1975, the use of literacy tests and any similar "test or device" [18] in any state or political subdivision not subject to suspension by reason of subsection 4(a) of the 1965 Act.[19] The literacy-test areas

[18] The term "test or device" is defined in subsection 201(b) and includes any prerequisite for voting which involves literacy, educational achievement, moral character or proving qualification by voucher of other persons. The definition is identical to that contained in subsection 4(c) of the 1965 Act, 42 U.S.C. 1973b(c) (Supp. V).

[19] The jurisdictions presently subject to suspension under subsection 4(a) of the Voting Rights Act are the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia; 39

which are covered by section 201 are the States of Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington and Wyoming; and 61 counties in North Carolina.[20] Two states, Connecticut and Idaho, have moral-character provisions which are also suspended by section 201.

2. The constitutional bases for section 201 are the Fourteenth and Fifteenth Amendments.

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 329, the Court noted that, in most of the states covered by the Voting Rights Act of 1965, literacy tests had been purposely administered so as to disfranchise Negroes. With respect to the states subject to suspension under section 201 of the Act as amended, Congress did not have similar evidence of intentional abuse in administration of tests. However, in addition to *South Carolina* v. *Katzenbach,* the decisions in *Katzenbach* v. *Morgan, supra,* and *Gaston*

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counties in North Carolina, one county in Arizona; and one county in Hawaii.

The date when the period of suspension under section 201 is to end, August 6, 1975, corresponds to the time of operation of subsection 4(a) as amended. That is, with respect to most of the jurisdictions covered by subsection 4(a), the coverage will have been in effect for 10 years as of August 6, 1975.

[20] A table setting forth the state laws providing for a "test or device" is contained in the Hearings on Voting Rights Act Extension before Subcommittee 5 of the House Judiciary Committee, 91st Cong., 1st Sess. (1969) p. 90. (Hereafter these hearings will be referred to as the "House Hearings.")

It should be noted that the literacy requirement of the Hawaii Constitution (included in the above-cited table) was repealed as a result of a referendum on November 5, 1968. The statutory provision implementing the literacy requirement was deleted in 1969. See Hawaii Rev. Stat., § 11-4, as amended.

County v. *United States*, 395 U.S. 285 (1969), make clear that section 201 is a proper exercise of congressional authority.

As the Supreme Court held in *Morgan* and in *South Carolina* v. *Katzenbach*, the test to be applied in determining the validity of the federal statute is that enunciated in *McCulloch* v. *Maryland*. It is apparent that section 201 was intended to implement the Fourteenth and Fifteenth Amendments—specifically, to correct what Congress found to be unwarranted, discriminatory restriction upon the franchise. The purpose of the legislation is demonstrated, for example, by the joint statement of the ten members of the Senate Judiciary Committee who supported the substitute bill which included section 201 and which, with modification, was ultimately adopted.[21] The joint statement included the following [116 Cong. Rec. 2758 (daily ed., March 2, 1970[22]]:

> . . . this extension [of the suspension of tests to areas not covered by the 1965 Act] is justified for two reasons: (1) because of the discriminatory impact which the requirement of literacy as a precondition to voting may have on minority groups and the poor; and (2) because there is insufficient relationship between literacy and responsible, interested voting to justify such a broad restriction of the franchise.

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[21] There was no Senate committee report on the Voting Rights Act Amendments. However, the above-mentioned statement of a majority of the members of the Senate Judiciary Committee serves the same function.

A chronology of the legislative history of the 1970 law appears in the Appendix, Ap. p. 44.

[22] The statement of the Judiciary Committee members is set forth in the Appendix, Ap. p. 12.

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The reasons described above are fully supported by the relevant factual material.

a. *Discriminatory effects of literacy tests.*

One ground utilized by Congress was application of the principles underlying *Gaston County* v. *United States, supra.* In *Gaston County*, a suit under section 4(a) of the Voting Rights Act of 1965,[23] the Court refused to permit reinstitution of a literacy test, in view of the fact that the (segregated) schools which the county had provided Negroes of voting age were inferior to those provided whites. The Court's opinion concluded as follows (395 U.S. at 296):

> Appellant [the county] urges that it administered the 1962 reregisration in a fair and impartial manner, and that in recent years it has made significant strides toward equalizing and integrating its school system. Although we accept these claims as true, they fall wide of the mark. Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.

[23] Section 4(a), 79 Stat. 438, 42 U.S.C. 1973b(a) (Supp. V).

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The *Gaston County* decision rested, not upon the Constitution, but upon a statutory provision.[24] However, the Court's reasoning related directly to Fourteenth and Fifteenth Amendment rights; and, in any event, it was proper for Congress to rely upon the *Gaston County* principle in framing legislation to effectuate those Amendments.[25] *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648.

Congress found, in light of such facts as (1) the failure of Negroes and other minorities, in various parts of the country, to receive equal educational opportunity and (2) the migration of Negroes from the South to literacy-test states, that the *Gaston County* rationale as to the discriminatory effects of literacy requirements applies throughout the United States.

First, as Attorney General Mitchell pointed out before the House and Senate subcommittees,[26] the principle of the *Gaston County* case is directly applicable to states or politi-

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[24] As noted previously, the Gaston County suit involved construction of subsection 4(a) of the 1965 Act.

The precise holding of the Supreme Court in *Gaston County* was that the District Court for the District of Columbia had properly determined that the county had failed to prove that, prior to 1965, its use of a literacy test had no racially discriminatory "effect". See 395 U.S. at 296.

[25] In making use of the rationale of *Gaston County* v. *United States,* Congress placed emphasis upon the underlying concern of protecting the rights of individuals (as opposed to placing sanctions on governments which failed to provide equal educational opportunity). See, *e.g.,* 116 Cong. Rec. 2770 (daily ed., March 2, 1970) (Senator Hruska).

[26] House Hearings, p. 222; Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2nd Sess. (1969, 1970), p. 185 (hereafter referred to as "Senate Const. Rights Hearings"). (The Attorney General's statement before the Senate subcommittee is set forth in the Appendix, Ap. p. 21.)

cal subdivisions which had limited Negroes to inferior, de jure segregated schools. Prior to 1954, such school systems existed in the southern and border states and in the District of Columbia. See House Hearings, p. 222 and Senate Const. Rights Hearings, p. 185 [Ap., p. 21] (statement of Attorney General Mitchell). Among the states which had de jure segregation are two of the states affected (at least in part) by section 201, *i.e.*, Delaware and North Carolina.[27] Clearly, the latter jurisdictions are covered by the *Gaston County* rationale.

Moreover, *Gaston County* applies even if the literacy test is imposed by a government other than that which failed to provide equal educational opportunity. In *Gaston* v. *United States*, the Supreme Court assumed that most of the adult residents of the county had been educated there. 395 U.S. at 293, footnote 9. However, the Court added that: "It would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems."[28] *Ibid.*

As Attorney General Mitchell suggested in urging support of a nationwide ban on literacy tests, Congress could properly rely upon the fact that large numbers of Negroes have migrated from the South to other parts of the United States.[29] According to the Bureau of the Census, net mi-

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[27] See, *e.g.*, Evans v. Ennis, 281 F.2d 385, 392, footnote 2 (C.A. 3), *cert. denied*, 364 U.S. 933 (1960) (inferiority of Negro schools in Delaware).

[28] In a prior footnote, the Court stated that: "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility." 395 U.S. at 293, footnote 8.

[29] See House Hearings, p. 223; Senate Const. Rights Hearings, p. 186 [Ap., p. 22].

gration of Negroes from the South between 1940 and 1969 totaled some 3.8 million persons.[30] That such persons received inferior education in segregated systems, both before and after 1954, is indicated by numerous court decisions.[31] And Congress had a valid basis for assuming that part of the movement by southern Negroes was to the northern and western states which employ literacy tests.[32]

Finally, it was pointed out by the Attorney General[33] and other witnesses that denial of equal educational opportunity occurs not only in school systems which had de jure segregation, but also in systems characterized by de facto segregation or racial isolation. The latter conditions exist throughout the United States,[34] including the states whose

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[30] Bureau of the Census, "The Social and Economic Status of Negroes in the United States, 1969", Current Population Reports, Series P-23, No. 29, p. 5.

[31] See, *e.g.*, *Lee* v. *Macon County Bd. of Ed.*, 267 F. Supp. 458, 471-472 (M.D. Ala.), *aff'd*, 389 U.S. 215 (1967); *United States* v. *Jefferson County Bd. of Ed.*, 372 F.2d 836, 891-892 (C.A. 5, 1966), *aff'd on rehearing en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967); *United States* v. *Mississippi*, 229 F. Supp. 925, 990 (S.D. Miss., 1964) (dissenting opinion), *rev'd*, 380 U.S. 128 (1965).

[32] For example, the 1960 Census indicates that even during the limited period, 1955-1960, there was substantial migration of Negroes from the South to such states as Arizona (4,388 persons, both adults and children), California (74,804), Massachusetts (7,418) and New York (74,821). See Bureau of the Census, 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 34, table 100.

[33] See House Hearings, p. 224; Senate Const. Rights Hearings, p. 186 [Ap., p. 22].

[34] For example, Howard A. Glickstein, then Acting Staff Director of the United States Commission on Civil Rights, testified as follows (House Hearings, p. 56):

> Nationally, a wide gap has existed—and continues to exist—between the quality of the public education afforded to white students and the quality of the public education available to

tests are suspended by section 201,[35] and are reflected in statistics on educational attainment.[36]

Negroes, Mexican-Americans, and members of other minority groups.

Studies such as the Coleman report ["Equality of Educational Opportunity" (1966)] and the Commission's "Racial Isolation in the Public Schools" show the educationally harmful effects upon Negro students of attending—as they do across the Nation—schools isolated by race and social class. Evidence at our recent hearing in San Antonio, Tex., indicated that similar damage is being done to Mexican-American students.

In addition, evidence at Commission hearings in Cleveland, Boston, Rochester, and San Antonio indicates that schools attended predominantly by minority students often have inferior facilities. • • •

[35] It should be noted that, apart from the matter of de facto segregation, official discrimination against Negroes or Mexican-Americans has been found in a number of public school systems in literacy-test states other than southern or border states. See *Gonzales* v. *Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz., 1951) (inferior schools afforded Mexican-Americans); *Spangler* v. *Pasadena Bd. of Ed.*, 311 F. Supp. 501 (C.D. Cal., 1970) (discrimination against Negroes); *Crawford* v. *Bd. of Ed. of the City of Los Angeles*, No. 822, 854, Super. Ct. for L.A. County (May 12, 1970) (discrimination against Negroes); *Taylor* v. *Bd. of Ed. of New Rochelle*, 294 F.2d 36 (C.A. 2), *cert. denied*, 368 U.S. 940 (1961) (racial segregation); and *Blocker* v. *Bd. of Ed. of Manhasset*, 226 F. Supp. 208 (E.D. N.Y., 1964) (racial segregation).

[36] Available data indicates, as to all regions of the United States, substantial disparities between the races in regard to years of school completed. See, *e.g.*, House Hearings, p. 224; Senate Const. Rights Hearings, p. 186 [Ap., p. 22] (Attorney General Mitchell); Bureau of the Census, "Educational Attainment (March 1968);" Current Population Reports, Series P-20, No. 182 (1969), table 3.

The 1960 Census indicates that similar disparities exist in particular literacy-test states. For example, in New York, 10.9 percent of Negro adults had completed 0 to 4 years of school, as opposed to 7 percent of the whites. For California, the corresponding figures were 10.9 percent for Negroes and 5.1 percent for whites. In Arizone, 34.7 percent of the nonwhites had completed 4 or fewer years of school, while only 7.4 percent of the white adults were in that

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In short, several applications of the *Gaston County* rationale constitute strong support for the suspension of literacy tests in the states and counties subject to section 201 of the Voting Rights Act as amended.[37] Other persuasive evidence that literacy requirements have discriminatory effects upon Negroes and other minority groups was brought to the attention of Congress.[38] Congress also had a sound basis for finding that literacy tests tend to discriminate against the poor.[39]

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category. In Massachusetts, the figures were 8.8 percent for Negroes and 2.5 percent for whites. 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 24, tables 94, 102 and 103.

[37] The decision in *Lassiter* v. *Northampton County Bd. of Elections*, 360 U.S. 45 (1959), where the North Carolina literacy-test requirement was held not to be unconstitutional on its face, has at best scant bearing upon the validity of section 201. First, that case did not involve the power of Congress to implement constitutional guarantees. See *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 649. Secondly, the matter of inequality of education was not put in issue in *Lassiter* and the Court was not called upon to decide that issue.

[38] A study conducted by the United States Commission on Civil Rights regarding northern and western states, based upon Bureau of the Census tabulations, indicated that "literacy tests do have a negative effect upon voter registration and that this impact of literacy tests falls most heavily on blacks and persons of Spanish surname". See Senate Const. Rights Hearings, pp. 399-407 [Ap., pp. 32-40].

A statement of Raymond Nakai, the Chairman of the Navajo Tribal Council, said that Navajos in New Mexico (which has no literacy test) are much more likely to be registered voters than are members of the tribe residing in Arizona. According to Mr. Nakai, a major cause of the difference is the Arizona literacy requirement which prevents Navajos who cannot read English or are unsure of their command of English from attempting to register. Senate Const. Rights Hearings, p. 678. The Attorney General of Arizona pointed out that: "Many of the older Indians were never privileged to attend a formal school . . ." Senate Const. Rights Hearings, p. 675.

b. *Lack of compelling state interest.*

As indicated previously, an alternative ground for the suspension of tests effected by section 201 was the congressional determination that the possible interests of a state in maintaing a literacy requirement are not sufficient to justify the resulting disfranchisement. See 116 Cong. Rec. 2758 (daily ed., March 2, 1970) [Ap., p. 50] (statement of 10 Judiciary Committee members).

First, many witnesses stated that, in view of the widespread availability of radio and television and the coverage given to local and national issues, a person need not be able to read to be informed.[40] It was pointed out that the Report of the President's Commission on Registration and Voting Participation (November 1963) had

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[39] *E.g.*, the 1960 Census showed that only a small percentage of persons (25 and over) with substantial income ($7,000 to $9,999 per year) had completed no more than 4 years of school, but that a sizeable percentage of persons with income of $1,999 or less had had no more than 4 years of school.

In Arizona, only 1.3 percent of the persons with income of $7,000 to $9,000 had completed at most 4 years of school, while 20 percent of the persons with income below $1,999 were in that category of education. For California, the corresponding percentages as to 0 to 4 years of school completed were 1.2 percent ($7,000-$9,999) and 9.6 percent ($0 to $1,999); the percentages for New York were 1.6 percent ($7,000-$9,000) and 11.5 percent ($0 to $1,999).

(It should be noted that the income data is per capita. Thus, the low-income category does not necessarily indicate poverty since it includes, *e.g.*, women with little or no income whose husbands earned adequate salaries. It can be assumed that the educational level of such women is much higher than that of persons in poverty-level families.)

Source: Bureau of the Census, 1960 Census of the Population, vol. I, pts. 4, 6 and 34, table 138.

[40] See, *e.g.*, House Hearings, p. 59 (Mr. Glickstein) and p. 222 (Attorney General Mitchell); and Senate Const. Rights Hearings, p. 185 [Ap., p. 21] (Attorney General Mitchell), and 468 (Bar Assn. of City of N.Y.).

reached the same conclusion and had recommended the abolition of literacy tests.[41]

Secondly, it is significant that most states do not have and have never had a literacy requirement as a precondition for voting.[42] This shows that no "compelling state interest," in terms of either the quality of the electorate[43]

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[41] The Report of the President's Commission stated the following view of the majority of the members (p. 40):

> Many media are available other than the printed word to supply information to potential voters. The Commission is not impressed by the argument that only those who can read and write or have a sixth grade education should have a voice in determining their future. This is the right of every citizen no matter what his formal education or possession of material wealth. The Commission recommends that no literacy test interfere with the basic right to suffrage.

See also pp. 55-59 of the Commission's Report.

[42] At most, 19 states have statutory or constitutional provisions prescribing the use of literacy tests. As noted previously, section 201 suspends literacy tests in 12 states and part of another state; the six other literacy-test states are those subject to suspension by virtue of subsection 4(a) of the 1965 Act.

In addition to the fact that the number of states which have literacy-test laws is limited, certain of the states which retain such laws either have ceased applying the requirement (as in the case of Delaware and Oregon) or leave the matter to the discretion of local registrars (reportedly, the case in California). See House Hearings, pp. 96, 102 and 104; Senate Const. Rights Hearings, pp. 407-409, 672, 676 and 677.

[43] In view of the history of the adoption of literacy requirements, the notion that the purpose of the requirements was to assure an intelligent electorate is subject to serious doubt.

As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind literacy requirements was to render politically impotent 'various racial, ethnic . . . [and] religious . . . groups' ". See Senate Const. Rights Hearings, pp. 413-414. Also, see p. 186 [Ap., p. 22] (statement of Attorney General Mitchell).

Cases citing evidence of the discriminatory purpose of literacy tests include: *Katzenbach* v. *Morgan, supra,* 384 U.S. at 654, foot-

or administrative convenience, necessitates disfranchisement of persons unable to read and write.

c. *Propriety of the means adopted by Congress.*

The suspension of tests imposed by section 201 of the Voting Rights Act as amended affects every literacy-test state and county in the nation, excepting only those jurisdictions which are subject to suspension under section 4(a) of the Act. The suspension is to continue until August 6, 1975, and section 201 provides no means by which a state or county may "escape" from its prohibition.

In light of the factual basis of the legislation, its comprehensive scope is entirely proper. As indicated above, the *Gaston County* principle, or the variation of it based upon migration of Negroes from the South, has wide application. Furthermore, the finding of lack of compelling state interest is directly pertinent to each of the jurisdictions[44] and means that the "tests and devices" do not

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note 14; and *Castro* v. *State*, 85 Cal. Rptr. 20, 466 P.2d 244, 248-249 (Cal. S.C., 1970) (California's English language requirement held unconstitutional as applied to persons literate in Spanish).

See generally, Liebowitz, English Literacy: Legal Sanction for Discrimination, 45 Notre Dame Law. 7 (1969).

[44] In addition to its effect upon literacy tests, section 201 suspends the moral-character tests of Connecticut and Idaho (the text of these provisions is set forth at House Hearings, pp. 90-91, footnotes 7 and 13.) The legislative record concerning these tests is limited. But see, *e.g.*, House Hearings, p. 59 (Mr. Glickstein); 116 Cong. Rec. 2759 (daily ed., March 2, 1970) (statement of Judiciary Committee members).

The fact that few states impose any such character test as a condition for voting demonstrates that no overriding state interest requires such a limit on the franchise. This conclusion as to lack of any sufficient state interest should warrant suspension of the moral-character tests. *Cf. Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 653.

meet the standards of the Equal Protection Clause. (See part A of this Argument.) At least, Congress had a fully adequate foundation for making that determination.

Accordingly, as in *South Carolina* v. *Katzenbach* and *Katzenbach* v. *Morgan, supra,* the remedies Congress employed in section 201 are well within the discretion which it has regarding implementation of the Fourteenth and Fifteenth Amendments.

C. *Section 202 Concerning Durational Residency Requirements in Regard to Presidential Elections Is a Proper Exercise of the Power of Congress to Implement the Fourteenth Amendment.*

1. Subsection 202(c) of the Voting Rights Act as amended, 84 Stat. 316, provides in pertinent part as follows:

> No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision. . . .

The general prohibition quoted above is implemented by subsections (d) and (e).[45]

[45] In addition to dealing with the matter of residency, section 202 prescribes uniform standards for absentee balloting in presidential elections and requires that each state provide for absentee registration with regard to such elections. However, the present suit relates only to the residency provisions of section 202.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

Subsection 202(d) requires each state to provide for the registration of (or other means of qualifying) all otherwise qualified residents who apply at least 30 days before a presidential election for registration to vote in such election. In effect, this subsection means that any otherwise qualified person who has resided in a state (or political subdivision) for at least 30 days prior to a presidential election must be treated as eligible to vote in such election.

Subsection 202(e) provides that any otherwise qualified person who moves to a state or political subdivision within 30 days of a presidential election and who is not eligible to vote in his new location must be allowed to vote for President and Vice President, in person or by absentee ballot, in the state or political subdivision of his prior residence.

The net result of these provisions is to make it possible for any otherwise qualified person to vote in a presidential election, regardless of the date when he changes his residence.

2. Prior to enactment of section 202, many of the states imposed lengthy state and local residency requirements with regard to voting for President and Vice President. Thirty-eight states (and the District of Columbia) required that, before a person who had moved into the state could vote in a presidential election, he must have resided in the state for more than 30 days.[46] The federal statute

[46] Tables showing the existing state and local residency requirements were placed in the Congressional Record by Senator Goldwater. See 116 Cong. Rec. 3542-43 (daily ed., March 11, 1970) [Ap., p. 59], tables 1-2.

Table 1, cited above, lists 37 states and the District of Columbia as requiring more than 30 days' residence for voting in presidential

prohibits enforcement of such durational requirements with respect to voting for President and Vice President.

In the other 12 states, existing laws prescribe a residency period of 30 days or less in regard to voting by new residents in a presidential election.[47] The operation of such requirements is not affected by section 202. Subsection 202(g) expressly provides that: "Nothing in . . . [section 202] shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."

A second type of durational requirement applies to residents of a state who move, within the state, to a new county, city or precinct. Under the pre-existing laws of 27 states, a person must have resided in the county or city for a period exceeding 30 days in order to be eligible

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elections. Subsequently, the Florida statute was amended to provide for a minimum of 45 days (as opposed to the prior minimum of 30). See Fla. Stat. Ann., § 97.031(2) as amended. Therefore, Florida must be added to the group of states whose residence requirement exceeded 30 days.

[47] Also, it should be noted that in one of the states included in the over-30-day category (Massachusetts), the prescribed period is 31 days. See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) [Ap., p. 59], table 1.

In two states (Oregon and Wisconsin), the existing requirement as to presidential elections is one day. (It should be noted that the table cited above shows Oregon as not requiring any particular duration of residency. Subsequent to preparation of the table, the Oregon law was amended to provide in effect for a one-day requirement. See Ore. Rev. Stat., § 247.420(1) as amended.) Five other states (Alaska, Hawaii, Nebraska, North Dakota and Oklahoma) have requirements of less than 30 days. Five states (Georgia, Maine, Michigan, Minnesota and New Hampshire) have laws prescribing a 30-day period regarding presidential elections.

to vote for President and Vice President;[48] and four of these states had precinct requirements of more than 30 days. Section 202 renders all such provisions unenforceable.[49]

The effect of the state and local residence requirements was described as follows by Senator Goldwater [116 Cong. Rec. 3538 (daily ed., March 11, 1970); Ap., p. 55]:

State Residence Requirements

> The worst offender [among existing election laws] is the burden on voting imposed by lengthy residency requirements. Sixteen of our States require a full year's residence within their boundaries before they will allow a citizen to vote for President and Vice President. One of these States actually requires residence for as long as 2 years before a citizen can vote. Standing alone, the laws of these few States disqualify more than 620,000 Americans of voting age who move from State to State in an election year.

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[48] See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., p. 59], table 2. That table shows Florida as requiring 6 months' residence in the county. The Florida statute was subsequently amended so as to permit a registered voter who moves from one Florida county to another to vote for President (and statewide offices) in the county of former residence, during the 6 months after the move. See Fla. Stat. Ann., § 97.100(1) as amended.

[49] The other 23 states either (1) have no county, city or precinct residence requirement whatsoever in regard to presidential elections, (2) prescribe a period of 30 days or less or (3) waive the usual residence law by allowing a person who moves within the state to vote in the place from which he moved. See 116 Cong. Rec. 3542 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., p. 59], table 2.

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In addition, three States, to which over 150,000 adult citizens move each year, impose a 6-month waiting period as a precondition to voting for President.

Thirty-two other States require waiting periods for new residents ranging from 3 months down to zero. Even these shortened periods result in the disqualification of nearly half a million otherwise eligible voters.

Mr. President, the combined effect of the various State residence laws is the denial of the right to vote for President in the case of over 1,120,000 Americans. • • •

Local Requirements

But this is only part of the story. Added to this obstruction to the free exercise of a citizen's franchise were numerous local rules that imposed a separate waiting period on persons who moved about inside a State. These laws affect both longtime residents of a State and newly arrived residents who may move after entering the State.

For example, if a citizen living in any one of 10 States changed his address to a different county or city in that same State as much as 6 months before the 1968 election, he would have lost his right to vote in that election. One might think that the cumulative effect of these strictly local rules would be small, but to the contrary they actually cause the disfranchisement of at least an additional 855,000 citizens.

Citizens Disqualified by Waiting Periods

• • •

Mr. President, it is clear from reading the table

[116 Cong. Rec. 3543, table 3] that no less than 2 million Americans are being denied a voice in the selection of their President solely because they have changed their residence. But let me emphasize that this figure is the bare bones minimum which can be proven.

Actually, the Gallup Poll's in-depth analysis of the 1968 election claims that the true number of citizens who were disfranchised by restrictive residence laws exceeded 5 million persons. What is more, one estimate made by the Census Bureau indicates that 5.5 million Americans were caught by these restrictions.

Since there were more than 21 million citizens of voting age who in fact made a change of households during the year preceding the 1968 election, it is my feeling that 5 million is much closer to the truth.

Thus, the pre-existing residency laws unquestionably had the effect of preventing a vast number of citizens from voting for President and Vice President.[50]

3. The Fourteenth Amendment provides the basis for the residency provisions of section 202.

Though the Constitution itself is silent with respect to the power of the states to prescribe qualifications of voters in presidential elections,[51] it has long been assumed that

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[50] See Bureau of the Census, "Estimates of the Population of Voting Age," Current Population Reports, Series P-25, No. 406 (1968), table 1 (but see footnote 1 of the table); and "Voting and Registration in the Election of November 1968," Series P-20, No. 192 (1969), table 16. See also Gallup Opinion Index, Report No. 42 (1968), p. 6.

[51] In contrast to the provisions regarding voter qualifications for elections for members of Congress (see Article I, section 2 and the

the states have authority to prescribe qualifications for voters in presidential elections. See *McPherson* v. *Blacker*, 146 U.S. 1, 35 (1892). However, as the Supreme Court made clear in *Williams* v. *Rhodes, supra*, 393 U.S. at 29, the authority of the states to legislate with respect to the selection of presidential electors is subject to the provisions of the Fourteenth Amendment.

As shown in part A of this Argument, Congress in exercising its power under section 5 of the Fourteenth Amendment, may remedy restrictions on the franchise irrespective of whether the restrictions are prohibited by the terms of the Amendment itself. *Katzenbach* v. *Morgan, supra.* See also *Harper* v. *Virginia Board of Elections, supra*, 383 U.S. at 678-680 (dissent of Justice Black). Accordingly, just as *Lassiter* v. *Northampton County Election Bd., supra*, was not determinative in *Morgan* (see 384 U.S. at 649), the decision in *Drueding* v. *Devlin*[52] is not controlling with regard to the validity of the residency provisions of section 202.

Drueding v. *Devlin* involved an attack upon the constitutionality of a durational residency requirement for voting in a presidential election; the case did not relate to any federal legislation. Moreover, it is by no means certain that, if the Supreme Court were to pass today upon

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Seventeenth Amendment), the provision regarding selection of the President (Article II, section 1) merely states that: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors [that is, members of the electoral college] . . ." for the purpose of choosing the President and Vice President.

[52] In 1965, in *Dreuding* v. *Devlin*, the Supreme Court summarily affirmed a district court decision upholding a one-year residency requirement with respect to presidential elections. 234 F. Supp. 721 (D. Md. 1964), *aff'd per curiam*, 380 U.S. 125.

the merits of such a residency requirement,[53] the state law would be upheld.[54]

In any event, the residency provisions of section 202 are "appropriate legislation" within the meaning of the pertinent test.

As was shown by Senator Goldwater and others, the state laws which are affected by the residency provisions of section 202 operated so as to prevent a large class of

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[53] In 1969, the Supreme Court decided *Hall* v. *Beals*, a case involving an attack on a state's six-month residency requirement with regard to voting for President and Vice President, 396 U.S. 45 (per curiam). The majority opinion did not discuss the merits of the constitutional challenge, but ruled that, because the 1968 election had been concluded and because, as of the time of the decision, the plaintiffs satisfied the residency requirement, the case had become moot and should be dismissed. Two justices dissented asserting that the case was not moot and that the state law was in violation of the Equal Protection Clause of the Fourteenth Amendment. 396 U.S. at 50, 51.

[54] See the dissent of Justice Marshall (joined by Justice Brennan) in *Hall* v. *Beals, supra*, 396 U.S. at 52, which stated that: "... if it was not clear in 1965 [when *Dreuding* v. *Devlin* was decided] it is clear now that ... [a state] may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose." According to the dissenting justices, the 6-months residency requirement at issue in *Hall* v. *Beals* did not satisfy the pertinent test of constitutionality.

The compelling-interest standard was also applied in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), where a majority of the Supreme Court held to be unconstitutional statutes imposing upon new residents a one-year waiting period for eligibility for welfare benefits. (The Court expressed no view in *Shapiro* as to other types of waiting periods or residency requirements. 394 U.S. at 638, footnote 21.)

In *Burg* v. *Canifle*, Civ. Action No. 69-855-C, D. Mass. (July 8, 1970), a three-judge district court held that the compelling-interest test was applicable to determination of the validity of a Massachusetts residency law governing the general matter of eligibility to vote.

citizens from voting for President and Vice President. Such persons were thus deprived of a significant aspect of the franchise, for the general principle as to the importance of the right to vote (see, *e.g.*, *Kramer* v. *Union Free School District, supra*) certainly applies with respect to selection of the President and Vice President.[55] *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); *Williams* v. *Rhodes, supra*, 393 U.S. at 31.

Regarding the interest of the states, Congress found that:

> . . . the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President . . . does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

See section 202(a)(6) of the Voting Rights Act as amended, 84 Stat. 316. The validity of this finding can be demonstrated by appraising the various justifications offered for the durational requirements.[56]

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[55] Application of the Equal Protection Clause to voting in presidential elections is not affected by the fact that a state might provide for appointment, rather than election, of presidential electors. Once it is decided to rely upon popular election, the state must, as with regard to any election, comply with the Fourteenth Amendment in determining eligibility to vote. *Williams* v. *Rhodes, supra*. *Cf. Kramer* v. *Union Free School District, supra*, 395 U.S. at 628.

[56] It is important to distinguish between the basic requirement that the person be a bona fide resident of the jurisdiction and the separate qualification as to length of residency. Section 202 deals with the latter and does not affect the former, except for the limited case of authorizing voting in a state or subdivision by persons who moved from the jurisdiction within 30 days of the presidential election. Regarding voting by former residents, see footnote 59, *infra*.

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The general basis for such limits on the franchise is to insure familiarity with local conditions, candidates and issues, but this is inapplicable to presidential elections because the issues and personalities involved are national. The new resident is as familiar with them as is the resident of long standing. See, *e.g.*, House Hearings, p. 225 (Attorney General Mitchell); 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (Senate Judiciary Committee members) [Ap. p. 50].

There is no merit in the related notion that a state may require a long period of residence on the ground that a presidential election may involve certain parochial interests of the state or city and, therefore, time is required to impress local viewpoints upon voters. *Cf. Carrington* v. *Rash, supra,* 380 U.S. at 94, where the Court stated that: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." See *Evans* v. *Cornman, supra,* 38 Law Week at 4512; *Hall* v. *Beals, supra,* 396 U.S. at 53 (dissent of Justice Marshall).

Nor can the administrative convenience of the states justify the lengthy residence requirements. Each state has a law providing for the closing of registration at some point before election day. With regard to such requirements of registration prior to the election, Senator Goldwater stated the following (Senate Const. Rights Hearings, p. 282):

> When these requirements are applied in a reasonable way, they can serve a valid purpose by protecting against fraudulent voting and allowing the election officials to carry out the paperwork and mechanics of holding an election.

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But whatever the reasons for permitting a State to set a closeout date for registering to vote for President, there is no compelling reason for imposing a separate and additional requirement that voters also must have been residents of the State for a particular length of time. If a State can satisfy its logistical needs by keeping its voting lists open up to 30 days before an election—as 40 States now do—what is the justification for barring citizens from balloting for President unless they have been residents of the State for 6 months or 1 year?

So long as a citizen is a good-faith resident of a State and the State has adequate time to check on his qualifications, the duration of his residency should have no bearing on his right to participate in the election of the President.

In view of the fact that a substantial majority of the states permit registration by at least some classes of citizens up to the thirtieth day prior to a presidential election,[57] Congress could properly conclude that a 30-day residency period is adequate to accommodate the legitimate logistical needs of the states and that the possibility of "some remote administrative benefit"[58] cannot warrant the separate,

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[57] See 116 Cong. Rec. 3543 (daily ed., March 11, 1970) (memorandum on registration closing days submitted by Senator Goldwater) [Ap., p. 60].

According to Senator Goldwater's memorandum, 31 states have special registration or application closing dates with respect to new residents and, in 18 of those states, a new resident may apply for a presidential ballot within 15 or fewer days of the election.

[58] *Carrington* v. *Rash, supra,* 380 U.S. at 96.

lengthy durational residency requirements.[59]

In regard to the interest of the states in preventing double voting and other fraudulent practices, adequate safeguards—other than wholesale disfranchisement of persons who change residences—are available.[60] In view of the standards of the Equal Protection Clause,[61] it is proper for Congress in effect to limit the states to use of the less restrictive safeguards.

As a general matter, Congress intended to—and did—give adequate weight to the needs and interests of state election officials. In discussing the amendment which was enacted as section 202, Senator Goldwater stated the following (116 Cong. Rec. 3539 (daily ed., March 11, 1970)) [Ap. p. 56]:

> . . . the basic practice that a State will have to establish once my amendment takes effect is one which most States already have put into operation. To date, 31 of our States have created a special method for voting in presidential elections in the case of new residents

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[59] Subsection 202(e) specifies that, in certain circumstances, a state (or locality) is to permit former residents to vote for President and Vice President. Voting by former residents in presidential elections is authorized under the laws of 10 states. See 116 Cong. Rec. 3543 (daily ed., March 11, 1970) (memorandum of Senator Goldwater) [Ap., p. 60]. Also, many states waive local residency requirements for persons who move within the state. 116 Cong. Rec. 3542, Table 2 [Ap., p. 59].

[60] The federal statute itself prescribes criminal penalties for false registration and other fraudulent acts relating to the residency provisions. See section 202(i), 84 Stat. 317. Many states have similar prohibitions against improper voting practices, and any state has the option of adopting such a law or providing other means of protecting the integrity of the registration and electoral process.

[61] See *Hall* v. *Beals*, *supra*, 395 U.S. at 52 (dissent of Justice Marshall).

who cannot meet the usual residence requirements. These citizens are allowed to vote for presidential electors but not for other offices.

This proves beyond any doubt that the States can set up the separate system for voting that is required under my amendment.

In short, every standard set forth in the amendment has been modeled after practices that are used by the States themselves and are proven to be workable. Therefore, I can safely say to those of my colleagues who share with me a special respect and concern for the strength and diversity of our State and local governments that their interests were fully taken into account in the preparation of this measure. * * *

In conclusion, in light of the above factors regarding (1) the interests of citizens disfranchised by durational requirements and (2) the absence of any substantial countervailing state interest, Congress determined that the state laws affected by section 202 are inconsistent with the guarantees of the Fourteenth Amendment.[62] That determination, we submit, was fully warranted and the remedies adopted by Congress are appropriate ones. At the very least, the Court can "perceive a basis" for the federal legislation. *Cf. Katzenbach* v. *Morgan, supra.* It follows that section 202 is a valid exercise of congressional authority.

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[62] Subsection 202(a), 84 Stat. 316, sets forth a number of other constitutional rights which are involved, including the inherent constitutional right to vote for President and Vice President, the right of interstate travel, and the privileges and immunities guaranteed by Article IV, section 2 of the Constitution. These alternative constitutional bases are discussed at 116 Cong. Rec. 3540-3541 (daily ed., March 11, 1970) (Senator Goldwater) [Ap., pp. 57-58].

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D. ***Reduction of voting age is a proper exercise of congressional authority effectuating the Fourteenth Amendment.***

1. Section 302 of the Voting Rights Act as amended, 84 Stat. 318, provides that:

> . . . no citizen . . . who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

As noted previously, the provisions of Title III lowering the voting age to 18 are to "take effect with respect to any election or primary held on or after January 1, 1971." Section 305, 84 Stat. 319.

At present, the minimum age for voting is 18 in two states, Georgia and Kentucky. The minimum voting age is 19 in Alaska and 20 in Hawaii, but, in all other states (and the District of Columbia), 21 is the prescribed age.[63] It was estimated that almost 10 million persons will be enfranchised by reduction of voting age to 18.[64]

2. Title III of the Voting Rights Act as amended is intended to implement the Equal Protection Clause of the Fourteenth Amendment. See section 301(a)(2), 84 Stat. 318. As pointed out, *supra,* in part A, the authority

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[63] A table showing past and forthcoming state referenda on reduction of the voting age was submitted by Senator Goldwater. See 116 Cong. Rec. 3218 (daily ed., March 9, 1970) [Ap., p. 70].

[64] See Senate Const. Rights Hearings, p. 328; 116 Cong. Rec. 3060 (daily ed., March 5, 1970) (memorandum of Senator Kennedy) [Ap., p. 66].

of the states to establish qualifications for voting is subject to the provisions of the Fourteenth Amendment. Age limits, like other qualifications for voting, are to be evaluated on the basis of the compelling-interest standard.[65]

That test—which was expressly relied upon by Congress[66]—demonstrates the validity of Title III. For, as the Court held in *Katzenbach* v. *Morgan, supra,* section 5 of the Fourteenth Amendment is a positive grant of legislative power and, in implementing the Amendment, Congress is not confined to prohibiting operation of state laws determined by a court to be invalid. In regard to sections 201 (suspension of tests) and 202 (elimination of durational residency requirements), the issue was whether Congress had employed its authority properly, not whether the judiciary would hold the affected state laws to be unconstitutional. The same inquiry is applicable to the federal statute lowering voting age; and, for reasons to be shown, the same conclusions—*i.e.*, that the federal law is valid—results.

3. The ordinary justification for restricting the franchise to those who are 21 and over is the lack of maturity of younger persons.[67] Congress concluded that such no-

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[65] In our view, the contrary holding of the district court in *WMCA Vote at 18 Club* v. *New York City Bd. of Elections,* No. 70 Civ. 1814, S.D. N.Y. (June 23, 1970), a suit involving the constitutionality of limiting the vote to persons 21 and over, is erroneous. Because the effect of age limits is to exclude a class of citizens from the franchise, there is no reason to apply a lesser test than that of compelling-interest.

[66] See section 301(a)(3), 84 Stat. 318.

[67] According to Professor Paul Freund, the historical basis for treating 21 as the age of majority is that "a young man was deemed to have become capable at that age of bearing the heavy armor of a knight." 116 Cong. Rec. 3503 (daily ed., March 11, 1970).

tion of maturity was no longer correct and that no state interest was sufficient to warrant denial of suffrage to persons between 18 and 21 years of age.

a. *Maturity and achievements of persons aged 18 to 21.*

As indicated repeatedly during congressional consideration of Title III, the level of education achieved by present-day youth is significantly higher than that of prior generations. For example, Senator Goldwater stated the following [116 Cong. Rec. 3216 (daily ed., March 9, 1970); Ap. p. 68]:

> In 1900 only 6% of Americans who had reached 18 were high school graduates. In fact, as late as 1940, only one-half of all 18-year-olds had completed high school.
>
> But this is 1970. This is the age of instant communications, all-news radio stations, T.V. news, and the most avid political concern on the part of young Americans that I have ever witnessed.
>
> Today fully 81% of Americans have graduated from high school before they reach 18. Almost 50% of 18-, 19-, and 20-year olds are enrolled in college. And the education which they are receiving is more advanced and intense than at any time in our history.
>
> In short, youth today is better informed and better equipped than any previous generation. They are without a doubt equally mature, both mentally and physically, as the average citizen who had reached 25 when I was growing up. In fact, they may be better able to comprehend the dramatic technological advances

and changing perspectives of modern life than many of their parents.

Similar information regarding progress in educational attainment was provided by others, including Speaker McCormack [see 116 Cong. Rec. 5675 (daily ed., June 17, 1970)].[68] Congress received other evidence that, at the present time, physical and mental maturity comes several years ealier than it did, say, 100 years ago.[69]

Employment is another area in which persons aged 18, 19 and 20 have demonstrated their responsibility and have made significant contributions to the nation. According to Department of Labor statistics on employment in the

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[68] A report of the Bureau of the Census entitled "Educational Attainment: March 1968" showed that, in the United States, the median number of school years completed was 12.2 for persons aged 18 and 19, but was only 8.8 for persons aged 65 to 75. Current Population Reports, Series P-20, No. 182 (1969), table 1.

[69] See 116 Cong. Rec. 3510 (daily ed., March 11, 1970) (Senator Bayh, referring to testimony of Dr. Margaret Mead); Senate Const. Rights Hearings, p. 323 and 116 Cong. Rec. 3057 (daily ed., March 5, 1970) (memorandum of Senator Kennedy) [Ap., p. 63].

During the February 1970 hearings of the Senate Judiciary Committee's Subcommittee on Constitutional Rights regarding amendment of the Voting Rights Act, several witnesses dealt with the matter of statutory reduction of voting age.

Also, hearings on proposed constitutional amendments to lower voting age were conducted by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee during the second session of the 91st Congress (February-March 1970). A number of the statements made before the Constitutional Amendments Subcommittee discussed the matter of statutory reduction and were inserted into the Congressional Record during the debate on what became Title III. See, *e.g.*, 116 Cong. Rec. 3216 (daily ed., March 9, 1970) (Senator Goldwater favoring statute); 116 Cong. Rec. 3417 (daily ed., March 10, 1970) (Assistant Attorney General Rehnquist, opposing statute).

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United States, 66.8 percent of the males and 49.3 percent of the females, aged 18 and 19, were in the labor force as of May 1970.[70] Though separate figures are not available for the 20-year age group,[71] it is reasonable to assume that a correspondingly large percentage of that group participated in the labor force.

Proponents of the legislation stressed not only the fact that millions of men and women in the affected age group hold jobs, but also the related fact of their paying substantial amounts of taxes to the federal and state governments.[72] Yet, in most states, as Senator Mansfield pointed out, "they [persons between 18 and 21] have no voice in the imposition of those taxes." 116 Cong. Rec. 2939 (daily ed., March 4, 1970).

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[70] See Department of Labor, Bureau of Labor Statistics, Employment and Earnings, vol. 16, No. 12 (June 1970), table A-3. The term "labor force" includes both civilian and military employment. Also, the term includes full-time and part-time employees and persons who are in the labor force, but are currently unemployed. For both males and females, aged 18 and 19, the unemployment rate was approximately 10.6 percent. Of the males, aged 18 and 19, *not* in the labor force, the vast majority were enrolled in school. Of the females, aged 18-19, not in the labor force, almost all were either in school or were "keeping house."

It should be noted that the percentages of persons aged 16 and 17 in the labor force (i.e., 44.1 percent for males; 30.4 percent for female) were significantly lower than those for the 18 to 19 year-old group.

[71] The pertinent tables include 20-year-olds in a 20-to-24 category.

[72] Unpublished data of the Office of Research and Statistics of the Social Security Administration indicates that persons aged 18, 19 and 20 had income (subject to the Social Security tax) of 15 billion dollars in 1967. (1967 is the latest year for which such calculations have been made.)

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One of the clearest indications that 18-year-olds are sufficiently mature to take part in and contribute to the electoral process is the experience in Georgia and Kentucky, where such persons have been eligible to vote for many years. Senator Cook described the experience in Kentucky, where the voting age has been 18 since 1955, as a "complete success." 116 Cong. Rec. 3215 (daily ed., March 9, 1970). Regarding the four states which permit persons below age 21 to vote, Senator Kennedy stated the following (Senate Const. Rights Hearings, p. 324; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [App. p. 64].

> Today, four states—Georgia since 1943, Kentucky since 1955, and Alaska and Hawaii since they entered the Union in 1959—grant the franchise to persons under 21. There is no evidence that the reduced voting age has caused any difficulty whatever in the states where it is applicable. In fact, former governors Carl Sanders and Ellis Arnall of Georgia have testified in the past that giving the franchise to 18-year-olds in their states has been a highly successful experiment.

Thus, substantial material showing the maturity of men and women, aged 18 to 21, and accomplishments relevant to their ability to exercise the franchise was brought to the attention of Congress.

b. ***Military service and other obligations placed upon the age group.***

A disproportionately large percentage of persons who take part in military service, as a result of the draft[73] or voluntarily,[74] are aged 18, 19 or 20.

In this regard, Senator Kennedy stated:

> The well-known proposition—"old enough to fight, old enough to vote"—deserves special mention. To me, this part of the argument for granting the vote to 18-year-olds has great appeal. At the very least, the opportunity to vote should be granted as a benefit in return for the risks an 18-year-old is obliged to assume when he is sent off to fight for his country. About 30% of our forces in Vietnam are under 21. Over 19,000 or almost half of those who have died in action there, were under 21. Can we really maintain that these young men did not deserve the right to vote?
>
> To be sure, as many critics have pointed out, the

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[73] All males in the United States must, with limited exceptions, register for the draft upon attaining age 18. 50 U.S.C. App. 453. Men between 18½ and 26 years of age are liable for training and service in the Armed Forces. 50 U.S.C. App. 454 (Supp. V).

The matter of the draft is dealt with in 50 U.S.C. App. 455 (Supp. V), which authorizes the President to prescribe rules and regulations concerning the manner of selecting persons for military service. On November 26, 1969, following an amendment to that provision, the President established a system of random selection. See Proclamation No. 3945, 34 Fed. Reg. 19017.

[74] Enlistment, *without* parental consent, is permitted in the Army, Air Force, Navy and Marine Corps at age 18 for males and 21, for females. 10 U.S.C. 3256(a); 8256(a); and 5533(a) and (b). Persons who have parental consent may enlist at lower ages.

No one under 21 is permitted to enlist in the Coast Guard unless he has parental consent. 14 U.S.C. 368.

abilities required for good soldiers are not the same abilities required for good voters. Nevertheless, I believe that we can accept the logic of the argument without making it dispositive. A society that imposes the extraordinary burden of war and death on its youth should also grant the benefit of full citizenship and representation, especially in sensitive and basic areas like the right to vote.

In the course of the recent hearings I conducted on the draft, I was deeply impressed by the conviction and insight that our young citizens demonstrated in their constructive criticism of our present draft laws. There are many issues in the 91st Congress and in our society at large with comparable relevance and impact on the nation's youth. They have the capacity to counsel us wisely, and they should be heard at the polls.

Senate Const. Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [Ap. p. 64].

According to recent statistics of the Department of Defense, 904,000, or 26.4 percent, of the men on active duty in the Armed Forces as of June 30, 1969 were 18, 19 or 20 years of age.[75] A majority of the persons who have been inducted into military service since 1965 are in that age category.[76]

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[75] See exhibit 1, Ap., p. 77.

[76] *E.g.*, during the first half of 1970, 55.4 percent of the inductees were 20 years of age and 2.6 percent were 19. For certain of the prior years, the combined percentages of the below-21 age groups were even higher. *E.g.*, of the 381,955 persons inducted in 1966, 30.8 percent were 20, 30.4 percent were 19 and one percent were 18.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

It is apparent that Congress had a strong basis for its finding that denial of the right to vote to citizens between 18 and 21 is "particularly unfair . . . in view of the national defense responsibilities imposed upon such citizens." See section 301(a) (1), 84 Stat. 318. The burden of military service and of the draft has a direct impact upon a substantial percentage of the men in that age group and also affects indirectly the young women. The need to grant such persons the opportunity to participate in the election of those who determine defense and foreign policy is surely one proper concern of Congress in effectuating the Fourteenth Amendment.

Another type of legal classification relied upon by Congress was laws regarding the age when a person is subject to criminal prosecution.[77] Senator Randolph pointed out that:

> In all states except one an 18 year old by law is treated as an adult in criminal court, fully responsible for his or her actions. In all states juvenile rights can be waived at the discretion of the court for even younger defendants. * * *

The number of inductees who were volunteers is small compared to the number of draftees. However, during each year since 1965, some 70-75 percent of the volunteers were under 21.

A table based on Selective Service Commission reports regarding inductions, 1965 to June 1970, is included in the Appendix. See exhibit 2, Ap., p. 78.

[77] The distinction between those who are within the jurisdiction of juvenile courts and those who may be prosecuted for the commission of a crime. The history and theory of juvenile courts in the United States is discussed in *In re Gault*, 387 U.S. 1, 14-29 (1967).

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

116 Cong. Rec. 3518 (daily ed., March 11, 1970) [Ap., p. 74].[78]

Proponents of Title III discussed other types of state laws, such as those regarding capacity to marry, which attach significance to the attaining of age 18.[79]

The relevance of laws extending rights and responsibilities to 18-year-olds was explained by Senator Kennedy in the following manner (Senate Const. Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970) [Ap. p. 64]:

> It does not automatically follow of course—simply because an 18 year-old goes to war, or works, or marries, or makes a contract, or pays taxes, or drives a car, or owns a gun, or is held criminally responsible like an adult—that he should thereby be entitled to vote. Each right or responsibility in our society pre-

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[78] Senator Randolph inserted a memorandum describing the laws of each state regarding age of criminal responsibility. In a number of states, the basic age as to liability for criminal prosecution is 16 or 17.

The pertinent federal statute, 18 U.S.C. 5031, defines "juvenile" as a person who has not reached 18 years of age.

[79] In many states, females who are 18 may marry without the consent of their parents and men who are between 18 and 21 may marry with parental consent. See, *e.g.*, N. Y. Domestic Relations Law, § 15; Cal. Civil Code § 4101. Senator Goldwater noted (apparently using 1960 data) that, at ages 18 and 19 and particularly at age 20, a substantial percentage of women were married. 116 Cong. Rec. 3216 (daily ed., March 9, 1970) [Ap., p. 68]. The percentages for males were smaller, but a substantial number of men, aged 18 to 21, were married. See Bureau of the Census, 1960 Census of the Population, vol. I, pt. 1, table 176. See also Bureau of the Census "Marital and Family Status: March 1969," Current Population Reports, Series P-20, No. 198 (March 25, 1970), which shows that since 1960 the median age at marriage had increased somewhat.

> sents unique questions dependent on the particular issue at stake. Nonetheless, the examples I have cited demonstrate that in many important respects and for many years, we have conferred far-reaching rights on our youth, comparable in substance and responsibility to the right to vote. * * *

Cf. Evans v. *Cornman, supra,* 38 Law Week at 4513.

In *Kramer* v. *Union Free School District, supra,* 395 U.S. at 626, the Supreme Court stated:

> . . . statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Congress determined that denial of the vote to citizens aged 18, 19 and 20 was not justified by any compelling state interest and that such denial[20] contravened the Equal Protection Clause.[21] In view of the factors outlined above

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[20] Congress had a valid basis for fixing the minimum age at 18, rather than at some lower figure. *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 657.

As Professor Archibald Cox noted: ". . . the educational system draws a major line roughly at eighteen years of age, upon graduation from high school." See 116 Cong. Rec. 3063 (daily ed., March 5, 1970). Other significant differences between 17-and 18-year-olds are reflected in statistics concerning employment, Selective Service obligations and military service. The experience of Kentucky and Georgia pertains to voting by 18-year-olds, but not younger persons.

[21] The validity of statutory reduction of voting age is not affected by section 2 of the Fourteenth Amendment. That section provides, in part, as follows:

regarding the achievements of and the responsibilities imposed upon that age group, the congressional findings are correct. In any case, the Court can undoubtedly perceive a basis for the congressional action. *Cf. Katzenbach* v. *Morgan, supra,* 384 U.S. at 656. It follows that, like sections 201 and 202, Title III is a valid enactment.

E. *Plaintiffs' attack on sections 4 and 5 as amended is premature and, in any event, is without merit.*

1. The 1970 amendment to subsection 4(a) of the Voting Rights Act suspends the use of "tests and devices" in any state or political subdivision (not already subject to suspension by virtue of the 1965 Act) which (1) the Attorney General determines maintained a test or device on November 1, 1968, and with respect to which (2) the Director of the Census determines that less than 50 percent of the

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But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2 was intended to remedy a different type of discriminatory denial of the right to vote [though this provision has not been enforced, see, *e.g., Dennis* v. *United States,* 171 F.2d 986, 993 (D.C. Cir. 1948)]. This provision reflected the fact that at the time of Reconstruction the states extended the franchise to men, aged 21 and over. There is, however, no sound reason for concluding that section 2, by implication, fixes a constitutional standard as to voting age and bars action determined by Congress to be necessary to implement the Equal Protection Clause.

residents of voting age were registered on November 1, 1968, or voted in the 1968 presidential election.[31] A covered state or county may terminate such suspension if it establishes, in an action in the District Court for the District of Columbia, that there has been no racially discriminatory use of a test or device during the preceding 10 years.[32]

2. The complaint alleges (in counts 7 and 8) that the abovementioned provisions of sections 4 and 5 of the Voting Rights Act as amended apply to New York County and have the effect of diluting the votes of plaintiffs Christopher, Cole and Lo Dico. These allegations are not correct.

The terms of subsection 4(a) make its coverage dependent upon determinations of the Attorney General and the Director of the Bureau of the Census. The Attorney Gen-

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[31] It should be noted that the jurisdictions which may be brought under subsection 4(a) as a result of the 1968 coverage formula are virtually the same as those subject to suspension of tests under section 201. Unlike subsection 4(a) whose operation depends upon determinations of the Attorney General and the Director of the Bureau of the Census, section 201 took effect immediately upon enactment. As indicated in part B of the Argument, section 201 presently suspends literacy and other tests in a number of states, including New York.

Jurisdictions brought within the coverage of subsection 4(a) must comply with section 5 of the 1965 Act which deals with review of new voting laws. Section 5, 79 Stat. 438, 42 U.S.C. 1973c (Supp. V.), as amended by the 1970 law, 84 Stat. 315. However, section 201 pertains only to suspension of tests. Jurisdictions covered by section 201 are not subject to section 5.

[32] See subsection 4(a) of the 1965 Act, 79 Stat. 438, 42 U.S.C. 1973(a) (Supp. V), as amended by section 3 of the 1970 law, 84 Stat. 315.

When a jurisdiction secures termination of subsection 4(a) coverage, it is no longer subject to section 5.

eral has found that the State of New York maintained a "test or device" on November 1, 1968.[34] However, the determinations of the percentage of the voting-age population registered for or voting in the 1968 presidential election have not been made. The Director of the Bureau of the Census has stated that such determinations will be made later this year when data from the 1970 census is available.[35] The method of implementation adopted by the Census Bureau is entirely proper.[36] Until the required determinations of voting-age population and voter participation have been made, it is not certain whether New York County (or any other jurisdiction) is covered by the amendment to section 4.[37] Accordingly, plaintiffs' attack upon that section is premature [*cf. United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947)], and should be dismissed.[38]

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[34] See 55 Fed. Reg. 12354 (August 1, 1970) [exhibit 3, Ap., p. 79].

[35] See exhibit 4, Ap., p. 80. The Bureau of the Census will, by interpolation, use the 1970 data to determine November 1968 voting-age population of the relevant jurisdictions.

[36] It should be noted that, under subsection 4(b) of the Voting Rights Act, 79 Stat. 438, 42 U.S.C. 1973b(b) (Supp. V), the determinations of the Director of the Census "shall not be reviewable in any court. . . ." See *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 332-333.

[37] During the Senate debate regarding amendment of section 4, references were made to registration and voting statistics for New York County and coverage of that county. However, such information was based on data from the 1960 census. [See 116 Cong. Rec. 3708 (daily ed., March 13, 1970) (Senator Cooper)] and cannot be determinative.

[38] Since applicability of section 5 depends upon the jurisdiction's being covered by subsection 4(a), plaintiffs' challenge to section 5 is also premature. In addition, while a covered state or county might have standing to contest the validity of the amendment to

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

3. Moreover, there is no merit in plaintiffs' contentions regarding the validity of the 1970 amendments to sections 4 and 5.

The effect of the amendments is to renew, through the use of 1968 data, the type of coverage formula contained in subsection 4(b) of the 1965 Act. In *South Carolina* v. *Katzenbach, supra*, the Supreme Court upheld the provisions of sections 4(b) and 5. That decision supports the validity of the 1970 amendments. Regarding the matter of overly extensive coverage, the Court stated the following in *South Carolina* v. *Katzenbach*, (383 U.S. at 331):

> Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during . . . [a specified previous period].

The same is true here, for, as noted above, subsection 4(a)'s provisions for termination of coverage are available to jurisdictions brought under the statute by the 1968 formula.

Thus, even apart from the matters of lack of ripeness and lack of standing, plaintiffs' objections to sections 4 and 5 are not well taken.

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section 5 (*cf. South Carolina* v. *Katzenbach, supra*), we submit that individual citizens would not have the type of legal interest which is a prerequisite to standing.

Exhibit—Memorandum in Support of Motion of Defendant John N. Mitchell

V. Conclusion

This action presents no material questions of fact and, for the reasons shown above, defendant John N. Mitchell is entitled to judgment as a matter of law. With respect to counts 1 through 6 of the complaint (the counts pertaining to sections 201, 202 and 302 of the Voting Rights Act as amended), summary judgment should be entered in favor of defendant Mitchell. With respect to counts 7 and 8 (regarding sections 4 and 5 of the Act), the Court should order dismissal or in the alternative should enter summary judgment in favor of defendant Mitchell.

Respectfully submitted,

Jerris Leonard
Assistant Attorney General

David L. Norman
Deputy Assistant Attorney General

David B. Marblestone
Jeremy I. Schwartz
Attorneys,
Department of Justice
Washington, D. C. 20530

Attorneys for Defendant John N. Mitchell

Thomas A. Flannery
United States Attorney

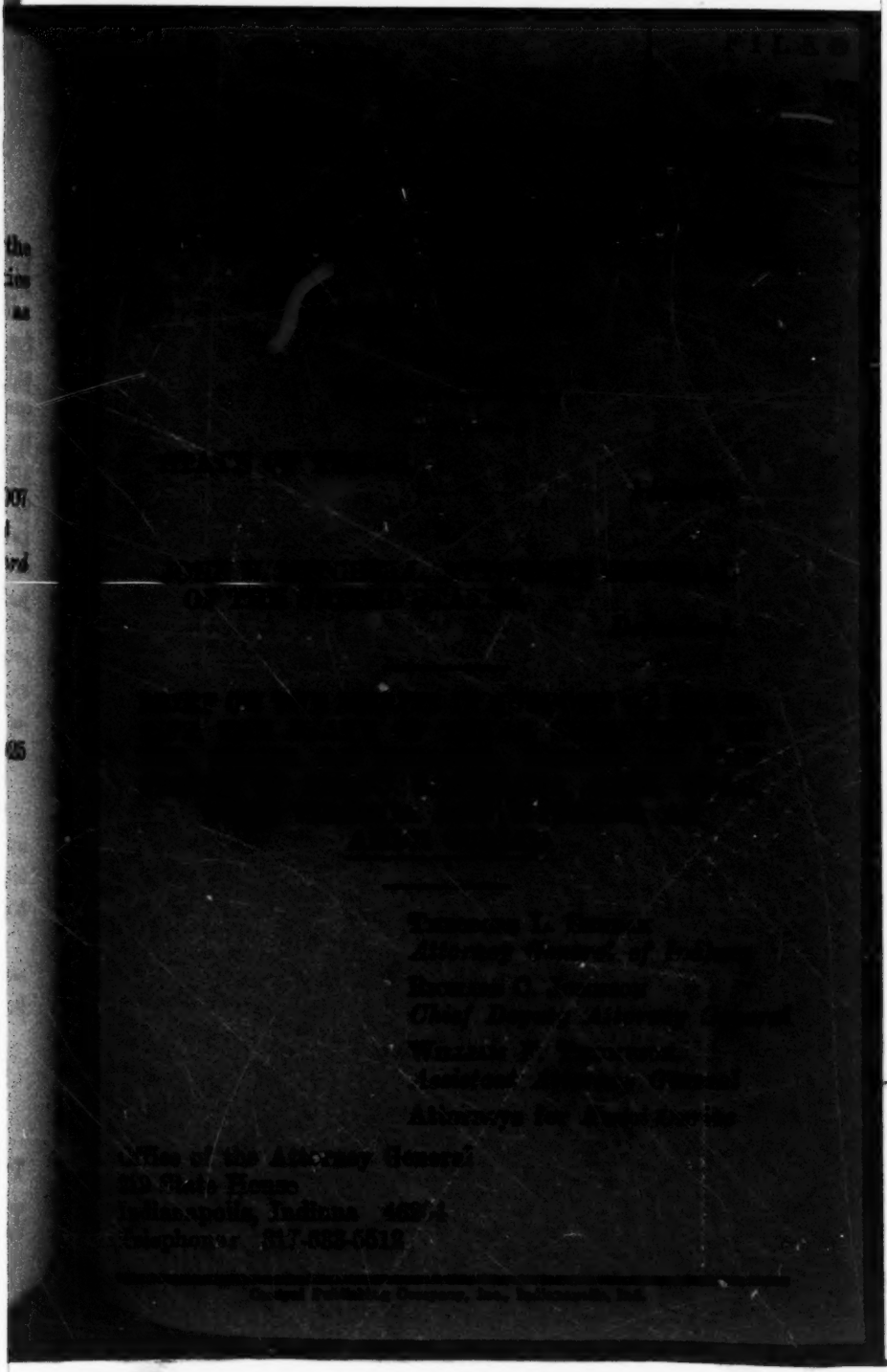
Certificate of Service

I hereby certify that on August , 1970, I served the foregoing Memorandum and the Appendix upon the parties in this action by mailing a copy to respective counsel as follows:

J. Lee Rankin
Corporation Counsel
Municipal Building
New York, New York 10007
Attorney for Defendant
New York City Board
of Elections

Alfred Avins
Suite 73
605 West 113th Street
New York, New York 10025
Attorney for Plaintiffs

David B. Marblestone
Attorney
Department of Justice
Washington, D. C. 20530



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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. 44 ORIGINAL

STATE OF TEXAS,

Plaintiff,

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant.

BRIEF ON THE MERITS IN SUPPORT OF PLAINTIFF, THE STATE OF TEXAS, SUBMITTED BY THE STATE OF INDIANA, JOINED BY THE STATES OF IDAHO, LOUISIANA, OHIO, UTAH, WEST VIRGINIA AND WYOMING, AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is submitted by Theodore L. Sendak, Attorney General for the State of Indiana, on behalf of the State of Indiana and is joined by other states having a similar interest in the outcome in this case.

The Voting Rights Amendment of 1970, Public Law 91-285, signed into law by the President of the United

States on June 22, 1970, *inter alia*, lowered the minimum voting age to eighteen in all states for all elections.

Article 2, § 2 of the Indiana Constitution setting out qualifications for voters in the State of Indiana provides for a twenty-one year old minimum voting age requirement. The minimum voting age requirement of the 1970 Amendment to the Voting Rights Act, Public Law 91-285, if enforced, would effectively abolish and nullify the minimum voting age provision of Article 2, § 2 of the Constitution of Indiana. The State of Indiana is joined in this brief by other States similarly affected.[1]

The State of Texas initiated an original action in this Court on August 3, 1970, with the filing of its Motion For

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1. For example listed below are those states setting twenty-one year old age requirements (unless otherwise noted) for voting:

State	Constitutional Provisions	Statutory Provisions
Alabama	Art. 8, § 177	
Alaska	Art. 4, § 1, sets nineteen years as the age required for voting	
Arizona	Art. 7, § 2	
Arkansas	Art. 3, § 1	
California	Art. 2, § 1	
Colorado	Art. 3, § 49-3-1	
Connecticut	Art. 6, § 1	
Delaware	Art. 5, § 2	
Washington, D. C.		Title 1, § 1-1102
Florida	Art. 6, § 1	
Georgia	Art. II, § 1, Ch. 2-702 sets eighteen years as the age required for voting	
Hawaii	Art. 2, § 1, sets 20 years as the age required for voting	
Idaho	Art. 6, § 2	
Illinois	Art. 7, § 1	
Indiana	Art. 2, § 2	
Iowa	Art. 2, § 1	
Kansas	Art. 5, § 1	
Kentucky	Sec. 145 Const. sets nineteen years as the age required for voting	
Louisiana	Art. 8, § 1	
Maine	Art. 2, § 1	
Maryland	Art. 1, § 1	
Massachusetts	Art. 3, (amend.) p. 492, Mass. Gen. Laws Ann.	

Leave to File Complaint, and Brief in support. This Court has ordered Briefs and Arguments on the merits. The State of Texas has put before this Court a significant and important controversy. The State of Indiana, joined by other states as *amici*, respectfully urges this Court to grant the Prayer of the Complaint submitted by the State of Texas in this cause.

Michigan	Art. 2, § 1	
Minnesota	Art. 7, § 1	
Mississippi	Art. 12, § 241	
Missouri	Art. 8, § 2	
Montana	Art. 9, § 2	
Nebraska	Art. 6, § 1	
Nevada	Art. 2, § 1	
New Hampshire		Title 4, Ch. 54:1
New Jersey	Art. 2, Para. 3	
New Mexico	Art. 7, § 1	
New York	Art. 2, § 1	
North Carolina	Art. 4, § 1	
North Dakota	Art. 5, § 121	
Ohio	Art. 5, § 1	
Oklahoma	Art. 3, § 1	
Oregon	Art. 2, § 2	
Pennsylvania	Art. 7, § 1	
Rhode Island	Art. 7, § 1	
South Carolina	Art. 2, § 3	
South Dakota		Part III, Ch. 16.0604
Tennessee	Art. 4, § 1	
Texas	Art. 6, § 2	
Utah	Art. 4, § 2	
Vermont		Vermont Stat. Ann. Title 17, Ch. 3, § 62
Virginia	Art. 2, § 18	
Washington	Art. 6, § 1	
*West Virginia	Art. IV, § 1	
Wisconsin	Art. 3, § 1	
Wyoming	Art. 6, § 2	

*Constitution does not provide an age but refers to "minors" as being ineligible to vote. Opinion Attorney General, July 21, 1965, established that "minors" means a person under the age of twenty-one.

ARGUMENT

THIS COURT SHOULD GRANT THE PRAYER OF THE COMPLAINT SUBMITTED BY THE STATE OF TEXAS IN THIS CAUSE.

When the voting rights Amendment of 1970, Public Law 91-285, hereafter referred to as the Act, became law, the affect of the state constitutions of the respective *amici*, providing for a minimum voting age higher than that provided by the Act, became uncertain. It is the position of *amici* that Congress exceeded its authority under the Constitution of the United States in providing for a minimum voting age of eighteen, applicable to all the States in all elections.

Article 1, § 2 of the Constitution of the United States provides that members of the House of Representatives be selected by voters in each state having the qualifications requisite for voters participating in elections for candidates for the most numerous branch of the state legislature. Similarly, the Seventeenth Amendment to the Constitution of the United States provides that members of the Senate be selected by voters in each state having qualifications requisite for voters participating in elections for candidates for the most numerous branch of the state legislature. And finally, the Tenth Amendment to the Constitution of the United States provides that all powers not delegated to the United States by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states.

By these provisions of the Constitution of the United States, the states are expressly left the right to determine

the qualifications of voters for candidates for all elections, state and federal. This view is supported by the Case *Breedlove v. Suttles,* 302 U.S. 277 (1937). There, this Court said:

> ". . . Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate. . . ." 302 U.S., at p. 283.

See also, *Lassiter, v. Northampton County Board of Elections,* 360 U.S. 45, 51 (1959); *Snowden v. Hughes,* 369 U.S. 1, 7 (1944); *Pope v. Williams,* 193 U.S. 621 (1904). Significantly, *Breedlove* involved the constitutionality of the Georgia Poll Tax, which this Court upheld in that case. An Amendment to the Constitution, the Twenty-Fourth, was required to eliminate state poll taxes.

Pursuant to the authority of the Constitution of the United States, the State of Indiana by Article 2, § 2, of the Indiana Constitution required that:

> "In all elections not otherwise provided for by this Constitution, every citizen of the United States, *of the age twenty-one years and upwards,* who shall have resided in the State during the six months, and in the township sixty days, and in the ward or precinct thirty days immediately preceeding such election, shall be entitled to vote in the township or precinct where he or she may preside." (Emphasis added).

All *amici* have similar constitutional provisions. See Footnote 1.

The twenty-one year old age requirement of Article 2, § 2 of the Indiana Constitution conforms with the common

law rule of majority that individuals do not reach majority until they have reached the age of twenty-one.

Bearing on the authority of Congress to enact federal legislation setting minimum age requirements for voting in all elections, is the restraint shown by previous Congresses. No other Congress has thought itself authorized to set minimum voting age requirements for the states. Traditionally, it has been necessary to ratify an Amendment to the Constitution of the United States in order to impose uniform voter qualifications throughout the states. Examples of this are the Fifteenth Amendment guaranteeing the right to vote regardless of race, color or previous condition of servitude; the Seventeenth Amendment providing for the direct election of Senators to the Congress of the United States; the Nineteenth Amendment granting women the right to vote; the Twenty-third Amendment giving to the residents of the District of Columbia the right to vote for the President and the Vice President of the United States; and the Twenty-fourth Amendment eliminating the payment of a poll tax as a prerequisite to voting in a federal election.

That the drafters of the Constitution of the United States intended to leave voting age qualifications to be set by the states is obvious from a reading of Federalist Paper No. 52 written by James Madison who kept the records of the debates of the Constitutional Convention. There Madison wrote:

> "[They are to be] the same with those of the electors of the more numerous branch of the State Legislature. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. *To have left it open for the occasional regulation of the*

> *Congress, would have been improper for the reason just mentioned.* . . . To have reduced the different qualifications of the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because, being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their Constitutions in such a manner as to abridge the rights secured to them by the federal Constitution." (emphasis added)

The proponents of the Act rely primarily upon Section 5 of the Fourteenth Amendment to the Constitution of the United States, *Katzenbach v. Morgan,* 384 U.S. 641 (1966), applying Section 5 of the Fourteenth Amendment to the Constitution of the United States and the Supremacy Clause of Article 6 of the Constitution of the United States as authorizing the Act and its enforcement. The applicability of the Supremacy Clause depends on whether the Act is "appropriate legislation" with the meaning of Section 5 of the Fourteenth Amendment to the Constitution of the United States, hereafter referred to as Section 5, as construed by this Court in the case *Katzenbach v. Morgan, supra.* Thus, the applicability of the Supremacy Clause would be an issue only if this Court were to hold the Act to be "appropriate legislation" within the meaning of Section 5, as construed by this Court in *Katzenbach.*

Amici submit that the Act is not "appropriate legislation" within the meaning of that phrase as it appears in Section 5. Furthermore, to the extent to which *Katzenbach*

might be construed as authorizing the Act, it should be overruled.

The phrase "appropriate legislation" must be reasonably construed. Congress, in the Act, purports to enforce Section 1 of the Fourteenth Amendment to the Constitution of the United States, hereafter referred to as Section 1. Section 1 prohibits certain specified state acts. Section 5 authorizes Congress to enforce "by appropriate legislation" the prohibitions of Section 1. The phrase "the provisions of this article" of Section 5 clearly limits the scope of what is "appropriate legislation." But for the enactment of the Fourteenth Amendment Congress would have no legislative authority in the area. Section 1 is the substance of the Fourteenth Amendment. Section 5, the authority of Congress under the Fourteenth Amendment, can neither add to nor subtract from the substantive provisions of Section 1. Thus, the authority of Congress to enact "appropriate legislation" is limited to guaranteeing the rights of citizens in those areas in which the states are prohibited from abridging, depriving or denying the rights of any citizen. The phrase "appropriate legislation" cannot be construed in a vacuum. It must be construed against the background of Section 1. A construction of Section 5 authorizing Congress to enact legislation in areas outside the proscriptions of Section 1 is unreasonable and unwarranted. Thus, turning to the case at hand, if the minimum voting age requirements of *amici* do not abridge the privileges or immunities of citizens of the United States, do not deprive any person of life, liberty or property without due process of law or do not deny to any person within their respective jurisdiction the equal protection of the laws, then Congress has no authority to enact legislation providing for a uniform minimum age of eighteen in all state elections.

This Court has never found a state minimum age requirement to be in violation of the Fourteenth Amendment. This Court has, by way of *dicta*, declared that minimum voting age requirements are within the exclusive authority of the states absent a showing of unreasonableness or discrimination, invidious or otherwise. See *Lassiter v. Northampton County Board of Elections, supra; Snowden v. Hughes, supra; Breedlove v. Suttles, supra; Pope v. Williams, supra.* The states' minimum voting age requirements, none setting limits above the age of twenty-one, are patently reasonable. At common law, an individual did not reach majority until the age of twenty-one. In conformance with this policy, most states have laws favoring individuals under the age of twenty-one. These laws all reflect a judgment on the part of the states involved that an individual does not achieve mature judgment until the age of twenty-one. The judgment of the states in this regard is not unreasonable.

To justify Title III of the Act, Congress expressed concern for eighteen to twenty-one year olds who have been required to shoulder national defense responsibilities, but who cannot vote in most state elections. Congress would give the vote to all eighteen year olds solely because some serve in the Armed Services. If this justifies Title III of the Act, then all those who serve in the Armed Services should be entitled to vote, such as seventeen year olds. Conversely, those who are not required to serve, should not be entitled to vote, male or female. Furthermore, if military service is rational criteron for qualifying an individual to vote, it would be just as rational a criterion for denying the vote. In other words, military service might be required to qualify a citizen to vote.

On the other hand, age as a qualifying criterion is embedded in the United States Constitution itself. For in-

stance, the age requirement for holding office is contained in Article I, § 2(2), requiring Representatives to Congress be at least twenty-five years of age, and is contained in Article 1, § 3(3) requiring that Senators be at least thirty years of age. Finally, Article 2, § 1(5) and the Twelfth Amendment require that the President and Vice President be at least thirty-five years of age to hold those offices. Another example is found in Section 2 of the Fourteenth Amendment requiring Representatives to be apportioned among the states on the basis of the number of citizens at least twenty-one years of age. Moreover, *amici* submit that *age is* an entirely *reasonable basis* to classify individuals.

Katzenbach v. Morgan, supra, may not be construed to authorize Congress to enact legislation which would not otherwise be authorized by Section 5 itself. As *amici* have argued already, Section 5 does not itself authorize the Act in issue. Similarly if Section 5 does not authorize the Act, then *Katzenbach* may not be construed to authorize the Act. *Katzenbach* may be construed reasonably to have held that that the New York English literacy requirement in issue there perpetrated an invidious discrimination against those literate in a foreign language in violation of the Equal Protection Clause of the Fourteenth Amendment. Although the majority chose to analyze the constitutionality of the congressional act involved in that case in terms of whether it was "appropriate legislation" within the meaning of Section 5, the majority went on to say that:

> "The result is no different if we confine our inquiry to the question of whether § 4(e) was merely legislation aimed at the elimination of an *invidious discrimination* in establishing voter qualifications." (emphasis added). 384 U.S. 653-654.

See also the dissent in *Cardona v. Power,* 384 U.S. 672 (1966), 675-677, a companion case to *Katzenbach,* written by Justice Douglas and joined by Justice Fortas, members of the majority in *Katzenbach,* for the proposition that Congress was authorized to enact § 4(e) of the Voting Rights Act of 1965 to prevent violation of the Equal Protection Clause by the enforcement of its English literacy provision. So limited, *Katzenbach* does not authorize unlimited Congressional legislation. Thus, the issue is whether the Act is "appropriate legislation." *Amici,* as argued in the preceding pages, submit that it is not. It attempts to amend the Constitution of the United States (Art. I, Sec. 2) by an act of Congress.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the Prayer of the Complaint submitted by the State of Texas, urging this Court to declare unconstitutional Title III of the Act, Public Law 91-285.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. JOHNSON
Chief Deputy Attorney General

WILLIAM F. THOMPSON
Assistant Attorney General

Attorneys for *Amici Curiae*

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: 317-633-5512

The following Attorneys General join in the submission of this brief:

IDAHO
HON. ROBERT M. ROBSON
Attorney General
Boise, Idaho 83702

LOUISIANA
HON. JACK P. F. GREMILLION
Attorney General
Baton Rouge, Louisiana 70804

WEST VIRGINIA
HON. CHAUNCEY H. BROWNING, JR.
Attorney General
Charleston, West Virginia 25305

OHIO
HON. PAUL W. BROWN
Attorney General
Columbus, Ohio 43215

UTAH
HON. VERNON B. ROMNEY
Attorney General
Salt Lake City, Utah 84114

WYOMING
HON. JAMES E. BARRETT
Attorney General
Cheyenne, Wyoming 82001

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IN THE

Supreme Court of the United States

October Term, 1970

No. 43 Original

STATE OF OREGON, *Plaintiff,*

against

JOHN N. MITCHELL, Attorney General of the United States, *Defendant.*

~~MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*~~ AND BRIEF *AMICUS CURIAE* OF THE DEPARTMENT OF ARMED SERVICES AND VETERANS AFFAIRS OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

NATHANIEL R. JONES
1790 Broadway
New York, N. Y. 10019

CLARENCE MITCHELL
1239 Druid Hill Avenue
Baltimore, Maryland

J. FRANCIS POHLHAUS
422 First Street S. E.
Washington, D. C. 20003

Attorneys for ~~Movant~~-Amicus

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IN THE

Supreme Court of the United States

October Term, 1970

No. 43 Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

BRIEF OF THE DEPARTMENT OF ARMED SERVICES AND VETERANS AFFAIRS OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*, IN SUPPORT OF DEFENDANT

Interest of the *Amicus Curiae*

The *amicus* is a unit within the National Association of Colored People, a membership organization, national in scope, of nearly one half million members. It shares with its parent organization the objective of extending the right to vote to all citizens, free from discrimination of any sort. Its parent organization has, for over sixty years, opposed, in the courts and in state and national legislatures, restrictions on the franchise such as the grandfather clause, poll taxes, literacy tests, property qualifications and other undue limitations on the right to vote. It supported passage of the legislation challenged in this case. In addition, the Department of Armed Services and Veterans Affairs seeks to protect and advance the rights of members and veterans

of the armed services, without regard to race, color or national origin. It believes the legislation here considered to be in the interest of servicemen and veterans.

ARGUMENT

On June 22, 1970, President Nixon signed into law Public Law 91-285, the Voting Rights Act Amendments of 1970.

Section 302 of said law provides:

> "Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

The instant case was instituted by the State of Oregon, which has constitutional provisions contrary to the provisions of Section 302. It seeks a declaration of unconstitutionality of Section 302 and other provisions of Title III of Public law 91-285.

Your amicus believes that Section 302 is constitutional under the 14th Amendment and Article I, Section 8, of the Constitution, and it is the purpose of this brief to so demonstrate.

I. Congress has power under Section 5 of the 14th Amendment to prohibit discrimination in voting based on age

The right of Congress to prohibit discrimination based on unreasonable requirements of a minimum age for voting is granted by Section 5 of the 14th Amendment, as interpreted by this Court in *Katzenbach* v. *Morgan,* 384 U.S.

641 (1966). See also *Everard's Breweries* v. *Day*, 265 U.S. 545 (1924), for interpretation of a similar provision of the 18th Amendment.

Amicus does not develop this argument further, as it is assured that it will be fully developed by the defendant and by other amici.

II. Congress has the authority to pass the 18 year voting provisions of this statute under its National Defense Powers

Article 1, Section 8, of the Constitution grants to Congress the powers to: "provide for the common defense" (clause 1); "declare war" (clause 2); "raise and support armies" (clause 12); "provide and maintain a navy" (clause 13); "make rules for the government and regulation of the land and naval forces" (clause 14).

We submit that the legislation under consideration may be held constitutional on the basis of these "war powers" of Congress [as they have been collectively treated by this Court, *Lichter* v. *U.S.*, 334 U.S. 742, 755-8 (1948).]

In considering the question of the constitutionality of a statute, the courts must concede every possible presumption in favor of its constitutionality. *Nebbia* v. *New York*, 291 U.S. 502, 538 (1934). If the court can find a rational basis for the action taken by Congress, "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Fleming* v. *Nestor*, 363 U.S. 603, 612 (1960), rehearing denied, 364 U.S. 854. As applied to this case these constitutional principles would require upholding of the validity of the statute if there is any basis for finding it constitutional, regardless of whether Congress enunciated that basis in the text of the statute, or in debate thereon.

If the statute is found to be "necessary and proper" to the exercise of the war powers [this Court equates "appropriate legislation" with this; see *Katzenbach* v. *Morgan*, 384 U.S. 641, 650, (1966)], it must be held constitutionally valid.

Looking to the exercise of the war powers by Congress, one sees that this Court has granted it great latitude in its exercise of legislative authority. A few examples are:

> The Court upheld the wartime prohibition act forbidding manufacture of malt liquor, whether or not intoxicating, in a decision rendered after cessation of hostilities. *Jacob Ruppert* v. *Caffey*, 251 U.S. 264 (1919).
>
> The Court sustained the authority of the federal government to build Wilson Dam and operate the hydro-electric plants of TVA, *Ashwander* v. *TVA*, 297 U.S. 288 (1935), and its right to create, manage and operate the Panama Canal. *N.Y. ex rel. Rogers* v. *Graves*, 299 U.S. 401, 406 (1937).
>
> It sustained the Emergency Price Control Act as applied to limit the price of public land sold by the State of Washington, despite that State's constitutional requirement that such land be sold to the highest bidder. *Case* v. *Bowles*, 327 U.S. 92 (1946).
>
> The Renegotiation Act was upheld over objections that it violated the right of contracts and amounted to taking of property without due process of law. *Lichter* v. *U.S.*, *supra*.
>
> The Court permitted the invalidation of California's community property law insofar as it conflicted with provisions of the National Service Life Insurance Act allowing servicemen to designate their beneficiaries. *Wissner* v. *Wissner*, 338 U.S. 655 (1950).
>
> The right of Congress to immunize personal property of non-domiciled servicemen from state taxation was upheld, as being directly related to the defense powers. *Dameron* v. *Brodhead*, 345 U.S. 322 (1953).

Congress has recognized, in passage of the Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. 501 et seq., its

broad powers in providing for national defense. In this Act it has set aside state law and established procedures for state and local, as well as Federal, courts to follow. The provisions of the Relief Act, which invade the powers otherwise reserved to the states to a much greater degree than the 18-year old voting law, are so clearly constitutional under the national defense powers that they have been challenged little. When subjected to constitutional attacks, they and the provisions of a predecessor law, the Relief Act of 1918, have been consistently upheld. For examples, see *Hoffman* v. *Charlestown Five Cents Savings Bank,* 121 N.E. 15; 231 Mass. 324 (1918); *Wenatchee Produce Co.* v. *Great Northern Railway Co.,* 271 F. 784 (E. D. Wash., 1921); *Erickson* v. *Macy,* 131 N. E. 744; 231 N. Y. 86 (1921); *Van Heest* v. *Veech,* 156 A 2d 301; 58 N. J. Super. 427 (1959).

The national defense needs and conditions that exist in the Nation can reasonably be held to warrant the exercise of Congressional power to grant the vote to 18 year olds.

For a period of thirty years the Nation has been engaged in war or preparation for war. In this period it has participated in three major wars. In the interim between actual warfare it has been in a state of national emergency, *de jure* or *de facto.* Young persons, during this entire period, have been subject to compulsory military service. At present the resistance to both war and military service has manifested itself by bombings, riots, desertions by servicemen and draft evasion by civilians, illegal occupation of armories and selective service headquarters by protestors, destruction of military and defense industry property, etc. Congress could conclude that this resistance impedes the national defense effort. Much of this anti-war effort is carried on by college and high school students, most of them in the 18 to 21 year old age brackets affected by the legislation under consideration. It is obvious that much of their disaffection is influenced by the fact that they are called

upon to implement national policies which they cannot affect through the democratic processes of political participation. Courts are bound to recognize that the legislature, whether or not it conducts a special investigation, is aware of the conditions and needs that exist. *Townsend* v. *Yeomans*, 301 U.S. 441, 451-2 (1937).

We submit that, given these facts, Congress, aware of its limitations under the Bill of Rights, and preferring remedial to punitive action, could make a rational decision that the extension of the vote to persons of the age 18 to 21 would lessen obstructions to the defense effort, support the morale of servicemen, and in doing so, "further the common defense." If such a decision is a reasonable one, and not forbidden by the Constitution, as we argue, then the legislation is necessary and proper to carry out Congressional responsibility to defend the Nation.

There is precedent for the exercise of Congressional authority to set aside state voting qualifications in the interest of national defense. In 1942 Congress provided in P.L. 77-712 that no person in military service in time of war could be required to register with state authorities or to pay a poll tax as pre-conditions to voting in Federal elections. This remained in effect until 1955, when it was repealed (P.L. 84-296). The poll tax as a precondition to voting was constitutionally permissible during this period, and registration is almost universally required.

Although Congress, in passing this legislation also relied on Article I, Section 4, of the Constitution, the Congressional debate shows that it was considered a defense measure.

The following excerpts from the debate on P.L. 712, 77th Congress, in Volume 88 of the Congressional Record, will show that Congress exercised the war powers in passing the law:

Representative Dirksen:

"In the first place, let us not forget that this is a bill of limited application. The very language says, 'In time of war.' It does not pretend to suspend state laws in time of peace. War is an abnormal condition. Allowances have to be made . . ." p. 6549

Representative Bradley of Pennsylvania:

"I want to make the observation that if there is any State law that deprives an American soldier, fighting for his country, of his right to cast a ballot in a Federal election, it should be set aside." p. 6550.

Representative Marcantonio:

"I say that if we can send out the message to members of the armed forces . . . that we, the Congress of the United States, will perpetuate . . . the poll tax —by which we deprive hundreds of thousands of men in the armed services of their vote, we shall be rendering a service to our Axis enemies.

"This legislation is in the interests of victory." p. 7068

Representative Heidinger:

"These men in the service will bear the greater part of the burden of defeating the Axis Powers in this war, and the only voice they will have in making the peace treaty is the right to vote for the men who will make that treaty. If they make the sacrifice to win this war, then why should not they have a voice in the selection of the men who will write the peace treaty when this war has been won?" p. 7072

Representative Ludlow:

"The principle of fundamental justice . . . is that if we send our boys to the far-flung battle fronts . . . we should not deny them the right to vote, even though the exercise of suffrage in their cases involves certain irregularities and the cutting of a lot of legislative red tape." p. 7075

Subsequent history indicates that Congress did not rely only on Article I, Section 4. When it decided to prohibit the use of the poll tax as a precondition to voting in federal elections on a permanent basis, it concluded said provision was not an adequate basis and passed the 24th Amendment.

We desire to draw an anology here to the authority of Congress to regulate interstate Commerce. We believe that as Congress can regulate rather minute details of intrastate commerce as an adjunct to its authority to regulate interstate commerce [*Wickard* v. *Filburn*, 317 U.S. 111 (1942)], so it can, in providing for the rights of servicemen, provide for the rights of all potential members of the armed services. This would mean that all persons 18 years old and above, being subject to long standing legislation obligating them to military service, or permitting them to serve, are proper subjects of Congressional concern to whom the rights here questioned may be granted.

Carrying the analogy to the interstate commerce power further, we believe that as the argument was advanced by the United States in *Heart of Atlanta Motel* v. *U.S.*, 379 U.S. 241 (1964) that the sit-ins and other demonstrations were in themselves an obstruction to commerce that Congress could remove by enactment of the public accommodations provisions of the 1964 Civil Rights Act (See 33 L.W. 3111), the anti-war, anti-conscription demonstrations of today place a burden on national defense that Congress can remove or alleviate by extending to persons likely to participate in such protests a channel for expressions of dissent that is less disruptive of the war effort. It is well established the Congress can remove burdens on interstate commerce, including those imposed by State law. *Northern Pacific Railway Co.* v. *Washington*, 222 U.S. 370 (1912); *NLRB* v. *Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Mitchell* v. *U.S.*, 313 U.S. 80 (1941); *Heart of Atlanta Motel, Inc.* v. *U.S.*, *supra*. We submit that Congress can likewise remove burdens on the defense effort.

Although Congress did not, in passing this legislation, specify in the text of the statute it was doing so pursuant to its war powers, it was quite aware of the connection between the vote and the war effort.

Senator Mansfield, the principal sponsor of the 18 year old voting amendment, made it clear that the main reason he favored the 18 year old vote was to extend the franchise to all who participated in the national defense effort. He said, in the course of debate of his amendment:

> "They fight our wars. You can brush aside that argument all you want, but that is a most important argument, and I think these youngsters who are called because of our responsibility, because we have laid down the policy, should have a right at least in some part, to influence the setting of that policy." 116 *Congressional Record.* S.-3502, daily edition.

Other Senators also spoke of this relationship. Senator Kennedy stated "if young people are old enough to fight, they are old enough to vote" and cited the high percentage of those under 21 who are fighting and dying in Vietnam, op. cit., p. S.-3478. Senator Hartke referred to youth participation in the Vietnam struggle, the justifiable complaints of being excluded from decision making, and the channel of expression for complaints through the voting process, op. cit., p. S-3497. Senator Cook spoke of the high percenttage of 18-20 year old servicemen and their losses in Vietnam, op. cit., p. S.-3499. Senator Young of Ohio did likewise, op. cit., p. S.-3500, as did Senator Pell, ibid. Senator Bayh made the same reference and spoke of the need to bring young people and their ideas into the system, op. cit., p. S.-3510. Senator Montoya, in supporting the amendment, noted the draft eligibility of those 18 years old and over, 116 *Congressional Record* p. S.-3583, daily edition. Senator Hatfield directly related the right to vote to the requirement to serve in wars, op. cit., S.-3584.

Taken as a whole, the debate in the Senate shows that one of the reasons, if not the reason, uppermost in the minds

of the members of the Senate for passage of the Mansfield amendment was the right of those who fight our wars to participate in the policy making affecting those wars.

In the House of Representatives, debate on the Mansfield amendment was limited because of procedural factors. Nevertheless, Congressmen found time to relate the amendment to the service of 18 to 20 year olds in Vietnam or to their eligibility to service in the armed forces. The following Representatives did so, as shown in the *Congressional Record* of June 17, 1970, the day on which the House passed the Voting Rights Act Amendments, including the Mansfield amendment:

Representative Matsunaga:

> "While we have revised the age for bearing arms to 18, we have kept the age for voting at 21. Surely, this discrimination was not intended by Congress. It is noteworthy in this connection that approximately one-half of Americans killed in combat in Vietnam fall within the age group of 18 to 21." p. H-5640

Representative Mikva:

> "Those who say 18 is too young to vote—are they prepared to change the draft laws to make 21 a minimum law for service?" p. H-5644

Representative McClory:

> "But today our young men are considered old enough—and strong enough to carry bullet-proof vests—and arms when they are 18. So, the original reason for the 21 years old minimum age is gone . . ." p. H-5645

Representative Long of Maryland:

> "I have here a list of 14 men from Maryland chosen at random, who died in Vietnam so far this year. Of the 14, 10 are under 21 years of age. These young people of 18, 19 and 20 are the ones who are carry-

ing the real burden of their country and are the ones who should have something to say about how it is run." p. H-5646

Representative Fascell:

"If an 18 year old is mature enough to bear arms in defense of his country . . . then we have surely discarded the notion of immaturity at 18 in every area except enfranchisement." p. H-5656

Representative Rodino:

"I need hardly remind Members of the House that 18 year olds are vulnerable to the military draft. Recent figures show that approximately one-third of the American troops in Vietnam are under 21. Nearly half of those killed in action are under 21." p. H-5657

Representative Annunzio:

"There can be no question, Mr. Speaker, that our young people deserve the vote. It is they who are being asked to give their lives in Vietnam." p. H-5658

Representative Cohelan:

"Our young people have assumed the responsibility of fighting our wars . . . Why should they be denied the right to vote?" p. H-5658

Representative Stokes:

"And the most familiar contention of all is still the most persuasive—if the young men of those ages can be required to fight and die half a world away, because of a handful of men here in Washington have the power to declare that their fighting and deaths are 'in the public interest,' then surely those young men have a right to determine who those men exercising such power will be." p. H-5661

Representative Tunney:

> "I say that their actions and their courage in South Vietnam and Cambodia prove them more than worthy." p. H-5667

Representative Robison:

> "The Congress, by means of the Selective Service Act, has determined that every male citizen who reaches age 18 must register for the draft and be available for induction. Indeed, our recent actions and those of the President place more of the burden of carrying on our wars on the younger men of our country. It is certainly logical to suggest that those who are subject to the draft should have some voice in their government." p. H-5673

We submit that the Congressional history of this amendment clearly indicates its passage was directly related to the national defense and is constitutional under Article I, Section 8 of the Constitution, and that regardless of whether such relationship is shown in the Congressional debate, it does in fact exist. Accordingly, the courts are required to recognize its existence "whether this reasoning in fact underlay the legislative decision." *Fleming* v. *Nestor, supra.*

CONCLUSION

We believe that the Court should uphold the constitutionality of Title III of P.L. 91-285 on the basis of Congress' power, under Section 5 of the 14th Amendment, to enact appropriate legislation. We submit that, in addition to that authority, Congress has the power to pass this legislation under Article I, Section 8.

Respectfully submitted,

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

CLARENCE MITCHELL
1239 Druid Hill Avenue
Baltimore, Maryland

J. FRANCIS POHLHAUS
422 First Street, S.E.
Washington, D. C. 20003

Attorneys for Amicus

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

STATE OF OREGON, *Plaintiff*, vs. JOHN N. MITCHELL, Attorney General of the United States, *Defendant.*	No. 43, Original
UNITED STATES, *Plaintiff*, vs. STATE OF ARIZONA, *Defendant.*	No. 46, Original
UNITED STATES, *Plaintiff*, vs. STATE OF IDAHO, *Defendant.*	No. 47, Original

AMICI CURIAE BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1970

INTEREST OF AMICI CURIAE

This brief is submitted by Citizens For Lowering The Voting Age—California, Independent Volunteers For Vote Extension (INVOLVE), Student California Teachers Association, Junior Statesmen of America, California Community College Student Government Association (CCCSGA), Let Us Vote (LUV), World Federalist Youth—USA, Kennedy Action Corps of the Greater Bay Area, Dennis King, Denise Puishes, Paul T. Currier, James Neil Alexander, and Sharon Guerrero, as friends of the court, in support of the constitutionality of Title III of the Voting Rights Act Amendments of 1970.

SUMMARY OF ARGUMENT

Katzenbach v. Morgan (1966) 384 US 641, 16 L ed 2d 828, 86 S Ct 1717 held that under Section 5 of Fourteenth Amendment, Congress has the power to permit any group of citizens to vote if the court can "perceive a basis" for a congressional conclusion that their exclusion from the vote violates the Equal Protection Clause. (384 US at 656, 16 L ed 2d at 838, 86 S Ct at 1726.)

Kramer v. Union Free School District (1969) 395 US 621, 23 L ed 2d 583, 89 S Ct 1890 interprets the Equal Protection Clause of the Fourteenth Amendment as forbidding the states from excluding from the franchise any group of its citizens, unless such exclusion is necessary to promote a compelling state interest.

The compelling state interest standard was employed in *Kramer* because plaintiff challenged the assumption that the state government fairly represented all the people (395 US at 628, 23 L ed 2d at 590, 89 S Ct at 1895). This reason for employment of the compelling state interest test is particularly persuasive when applied to the exclusion from the vote of 18-20 year olds. They have been "locked into a self-perpetuating status of exclusion from the electoral process," whereas the plaintiff in the *Kramer* case participated in the election of the New York State Legislature which established the restriction of which he complained.

Together, *Kramer* and *Katzenbach* mean that Title III is constitutional if a basis can be perceived for a congressional finding that the exclusion from the vote of 18-20 year olds is unnecessary to promote a compelling state interest.

Congress did not act irrationally when it found that the exclusion of 18-20 year olds from the vote "does not bear a reasonable relationship to any compelling state interest" and denies rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment (Title III, Section 301(a) (2) and (3)). Congress was uniquely qualified to assess and weigh the interests of the states, those aged 18 through 20 years, and the nation.

Title III must also be sustained under the alternate holding in *Katzenbach v. Morgan*. A basis can be perceived for congressional findings that 18-20 year olds need the vote to overcome discrimination and that this need warrants intrusion upon state interests.

Federal legislation establishing a uniform national voting age in presidential elections and presidential primaries is, in all events, constitutional. Once Congress has spoken, the states can have no compelling interest in preventing United States citizens from voting for their president and vice-president.

ARGUMENT

I. CONGRESSIONAL ACTION PERMITTING ANY GROUP OF CITIZENS TO VOTE MUST BE UPHELD IF THE COURT CAN PERCEIVE A BASIS FOR A CONGRESSIONAL DETERMINATION THAT THEIR EXCLUSION FROM THE VOTE VIOLATES THE EQUAL PROTECTION CLAUSE.

Katzenbach v. Morgan (1966) 384 US 641, 16 L ed 2d 828, 86 S Ct 1717, upheld the constitutionality of Section 4(e) of the Voting Rights Act of 1965. Section 4(e) provided that no state could deny the right to vote to any person on the ground of his inability to read or write English if such a person had completed the sixth grade in a Puerto Rican School in which the language of instruction was not English. Congressional power to grant the right to vote to English illiterates was sustained under Section 5 of the Fourteenth Amendment. Section 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

The court rejected defendant's argument that an exercise of Congressional power under Section 5 of the Fourteenth Amendment is invalid unless limited to prohibiting the enforcement of state laws which a court would in any event declare unconstitutional as

being in violation of Section 1 of the Fourteenth Amendment. In this regard, the court states as follows:

> The Attorney General of the State of New York argues that an exercise of congressional power under Section 5 of the Fourteenth Amendment that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce. More specifically, he urges that Section 4(e) cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judiciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by Section 4(e) is forbidden by the Equal Protection Clause itself. We disagree. Neither the language nor history of Section 5 supports such a construction. As was said with regard to Section 5 in Ex parte Virginia, 100 US 339, 345, 25 L ed 676, 679, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of Section 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge

unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of Section 1 of the Amendment.

384 US 648-649, 16 L ed 2d 833-834, 86 S Ct at 1722.

The court reasoned that Section 5 grants the same broad power to Congress regarding the Fourteenth Amendment as expressed in the Necessary and Proper Clause (384 US at 650, 16 L ed 2d at 835, 86 S Ct at 1723). "Correctly viewed, Section 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment" (384 US at 651, 16 L ed 2d at 836, 86 S Ct 1723-1724).

The court adopted the standard employed by *McCulloch v. Maryland*, 4 Wheat 316, 421, 4 L ed 579, with respect to the Necessary and Proper Clause in holding that Section 4(e) was appropriate legislation to enforce the Equal Protection Clause (384 US at 651, 16 L ed 2d at 836, 86 S Ct at 1724). Under this standard the only questions to be considered were: (1) whether Section 4(e) could be regarded as an enactment to enforce the Equal Protection Clause, (2) whether it was "plainly adapted to that end", and (3) whether it was not prohibited by but consistent with the Constitution (384 US at 651, 16 L ed 2d at 836, 86 S Ct at 1724).

As to the first question, there was "no doubt" in the court's mind that Section 4(e) could be regarded

as an enactment to enforce the Equal Protection Clause. It could be viewed as a measure to overcome discrimination either in the imposition of voting qualifications or in the provision or administration of governmental services (384 US at 652, 16 L ed 2d at 836, 86 S Ct at 1724).

As to the third question, it was held that the Congressional remedies adopted in Section 4(e) were not prohibited by but consistent with the Constitution, even though Section 4(e) only protected the voting rights of some English illiterates (384 US 656-657, 16 L ed 2d at 839, 86 S Ct at 1727). Section 4(e) was not invalid merely because Congress "might have gone further than it did" (384 US at 657, 16 L ed 2d at 839, 86 S Ct at 1727).

The court answered the first and third questions in summary fashion. The only question worthy of consideration was the second question; that is, was the legislation plainly adapted to furthering the Equal Protection Clause.

Even regarding that question, the court had little doubt. It states that Section 4(e) "may be readily seen as 'plainly adapted' to furthering these aims of the Equal Protection Clause" (384 US at 652, 16 L ed at 836, 86 S Ct at 1724).

When the court says that Section 4(e) is plainly adapted to furthering "these aims", the words "these aims" refer back to the statement in the preceding paragraph that Section 4(e) may be viewed as a measure aimed at overcoming discrimination (1) in

voting requirements, or (2) in the provision and administration of governmental services (384 US at 652, 16 L ed 2d at 836, 86 S Ct at 1724). The conclusion of the court was that Section 4(e) was plainly adapted to furthering *both* of those aims.

With reference to discrimination in voting requirements, the court states:

> The result is no different if we confine our inquiry to the question whether Section 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications.
>
> 384 US 653-654, 16 L ed 2d at 837, 86 S Ct at 1725.

> Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.
>
> 384 US at 656, 16 L ed 2d at 838, 86 S Ct at 1726.

In summary, *Katzenbach* stands for the proposition that Federal legislation aimed at eliminating discrimination in voting against any group of citizens is "plainly adapted" to that end and therefore "appropriate legislation" under Section 5 of the Fourteenth Amendment if the court can "*perceive* a basis upon which Congress *might* predicate a judg-

ment" (emphasis added) that the denial of the vote to such group violates the Equal Protection Clause.

II. EVEN IN THE ABSENCE OF CONGRESSIONAL ACTION, THE EQUAL PROTECTION CLAUSE BY ITS OWN FORCE FORBIDS THE STATES FROM DENYING THE VOTE TO ANY GROUP OF ITS CITIZENS UNLESS SUCH DENIAL IS NECESSARY TO PROMOTE A COMPELLING STATE INTEREST. THE FOREGOING IS TRUE WHETHER THE DENIAL OF THE VOTE IS BASED ON AGE OR ANY OTHER GROUND.

State laws governing the qualification of voters are subject to the limitations of the Equal Protection Clause. (*Carrington v. Rash* (1965) 380 US 89, 13 L ed 2d 675, 85 S Ct 775; *Harper v. Virginia State Bd. of Elections* (1966) 383 US 663, 16 L ed 2d 169, 86 S Ct 1079; *Kramer v. Union Free School District No. 15* (1969) 395 US 621, 23 L ed 2d 583, 89 S Ct 1886). Mr. Justice Harlan's dissent in *Carrington v. Rash* notes that it is the first case holding that state voter qualifications are subject to the Equal Protection Clause. (380 US at 97, 13 L ed 2d at 681, 85 S Ct at 780).

Prior to *Carrington v. Rash*, the court had upheld the constitutionality of a literacy test in *Lassiter v. Northampton County Bd. of Elections* (1959) 360 US 45, 3 L ed 2d 1072, 79 S Ct 985 and a requirement that voters be registered in a state for at least a year in *Pope v. Williams* (1904) 193 US 621, 24 S Ct 573, 48 L ed 817. Mr. Justice Harlan points out in his dissent in *Carrington v. Rash* that the *Lassiter* and *Pope* cases were primarily concerned with the appli-

cation of the Fifteenth Amendment, not the Equal Protection Clause, to state laws governing the qualifications of voters. (See footnote No. 1, 380 US at 98, 13 L ed 2d 681-682, 85 S Ct at 781.)

General language contained in the *Lassiter* and *Pope* cases regarding the "broad" power of the states to establish voter qualifications is inconsistent with the line of recent Supreme Court cases commencing with *Carrington v. Rash* and culminating in *Kramer v. Union Free School District No. 15* (1969) 395 US 621, 23 L ed 2d 583, 89 S Ct 1886. Mr. Justice Stewart's dissent in the *Kramer* case notes that the literacy test in the *Lassiter* case was upheld under the traditional test used to determine a statute's validity under the Equal Protection Clause and that under this test a legislative classification is invalid only if it rests on grounds wholly irrelevant to achievement of its objective. (395 US at 636, 23 L ed 2d at 595, 89 S Ct at 1894.) There was no consideration in the *Lassiter* case as to whether literacy tests were necessary to promote a compelling state interest.

The principle is now established that any exclusion of citizens from the right to vote must be carefully and meticulously scrutinized by the courts and that the Equal Protection Clause of the Fourteenth Amendment is violated unless the exclusion is necessary to promote a compelling state interest. (*Kramer v. Union Free School District No. 15,* 395 US 621, 23 L ed 2d 583, 89 S Ct 1886.) The *Kramer* case involved the constitutionality of a New York law limiting school district voters in certain

New York school districts to those who owned or leased taxable real property in the district, were the spouse of one who owned or leased such property, or were the parent or guardian of a child enrolled in a local district school. Plaintiff was unmarried, without children, and did not own or lease any real property in his school district. The court addressed itself to the question of "whether the exclusion was necessary to promote a compelling state interest." (395 US at 630, 23 L ed 2d at 591, 89 S Ct at 1891.) It was held that it was not.

The Supreme Court states as follows:

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, 393 US 23, 30, 89 S Ct 5, 10, 21, L ed 2d at 24 (1968). And, in this case, we must give the statute a close and exacting examination. "(S)ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 US 533, 562, 84 S Ct 1362, 1381, 12 L ed 2d at 506 (1964). See Williams v. Rhodes, *supra,* 393 US at 31, 89 S Ct at 10; Wesberry v. Sanders, 376 US 1, 17, 84 S Ct 526, 535, 11 L ed 2d 481 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining

who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

395 US at 626, 23 L ed 2d at 589, 89 S Ct at 1889.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the court can conceive of a "rational basis" for the distinctions made are not applicable. See Harper v. Virginia State Bd. of Elections, 383 US 663, 670, 86 S Ct 1079, 1083, 16 L ed 2d 169 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

395 US 627-628, 23 L ed 2d 589-590, 89 S Ct at 1890.

The majority of the court reasoned that only a compelling state interest could justify the exclusion of

plaintiff from the school district elections despite the fact he was eligible to vote in all other elections, including the election of the New York Legislature which enacted the law excluding him from voting in school district elections.

The court states as follows:

> And, the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.
>
> 395 US at 628, 23 L ed 2d at 590, 89 S Ct at 1890.

The dissenting opinion of Mr. Justice Stewart in the *Kramer* case argues that the reason advanced by the majority of the court for applying the compelling state interest standard, rather than the traditional equal protection standard, was not applicable since "The voting qualifications at issue have been promulgated not by Union Free School District No. 15, but by the New York State Legislature and the appellant is of course fully able to participate in the election of representatives in that body." (395 US at 639, 23 L ed 2d at 596, 89 S Ct 1895-1896.) The dissenting opinion further states:

> The appellant is eligible to vote in all state, local, and Federal elections in which general govern-

> mental policy is determined. He is fully able, therefore, to participate not only in the processes by which the requirements for school district voting may be changed, but also in those by which the levels of state and Federal financial assistance to the District are determined. He clearly is not locked into any self-perpetuating status of exclusion from the electoral process.
>
> 395 US at 640, 23 L ed 2d at 597, 89 S Ct at 1896.

The reasons advanced by the majority of the court in the *Kramer* case for the application of the compelling state interest standard are particularly persuasive when applied to the exclusion from the vote of persons aged 18 through 20 years. Unlike the plaintiff in the *Kramer* case, those aged 18 through 20 years have been "locked" into a "self-perpetuating status of exclusion from the electoral process" since they do not participate in the selection of the legislators who deny them the right to vote.[1]

---

[1]There are two procedures for amendment of the Constitution of the State of California. One requires the affirmative vote of two-thirds of all members elected to each of the two houses of the California Legislature followed by ratification by a majority of the qualified electors voting thereon at a general election. (Cal. Const., Art. XVIII). The other requires a petition circulated and signed by registered qualified voters equal to 8% of all votes cast for all candidates for Governor at the last preceding election at which a Governor was elected followed by ratification of the amendment by a majority of the qualified electors voting thereon at a general election. (Cal. Const., Art. IV, Sec. 1). At the present time such a petition must be signed by 520,276 registered qualified voters.

On August 21, 1970, the California Senate defeated a measure to amend the California Constitution to lower the voting age to 18 years. Commencing in 1947, twenty-nine separate bills have been introduced in the California Legislature to amend the California Constitution to lower the voting age to 18 or 19 years (Assembly Interim Committee on Elections and Constitutional Amendments,

The court in the *Kramer* case states as follows:

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.
>
> 395 US 626-627, 23 L ed 2d at 589, 89 S Ct at 1889.

The war in Viet Nam and the imposition upon 18-20 year olds of the greater part of the national burden of compulsory military service are "affairs which substantially affect their lives" in which they have had no "effective voice."

Congress was entitled to use the standard employed in the *Kramer* case to determine the constitutionality of the exclusion from the vote of 18-20 year olds. Congress had the right to ask the question: is the exclusion from the vote of 18-20 year olds necessary to promote a compelling state interest. There is nothing in the Constitution that grants a greater authority to a state to exclude citizens from the vote when the exclusion is based on age than when based on other grounds.[2] Except for exclusions based on

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1969 *Interim Report on Minimum Voting Age/Age of Majority*, p. 38). None of these bills passed the State Legislature. All but one died in committee. The people of California have not been permitted by their legislature to vote on the question of whether their Constitution should be so amended.

[2]The sole reference in the Constitution to age in connection with voting occurs in Article XIV, Section 2, which provides for a reduction of a state's representatives in the House of Representatives "when the right to vote at any election . . . is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime . . ." Article XIV, Section

race or sex, which are specially prohibited by the Constitution, the same standard is employed to determine the constitutionality of the exclusion from the vote of any group of citizens. Only exclusions necessary to promote a compelling state interest are valid.

Mr. Justice Stewart notes in his dissent in the *Kramer* case:

> For as I have suggested, there is no *persuasive reason for distinguishing constitutionally* between the voter qualifications New York has required for its Union Free School District elections and *qualifications based on factors such as age,* residence, or literacy. (Emphasis added.)
>
> 395 US at 641, 23 L ed 2d at 597, 89 S Ct at 1896.

2, sets forth a sanction against voting discrimination based on a formula which describes those persons who were eligible to vote in 1866. Under this formula, the representation by a state in the House of Representatives is reduced "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state". The reference to 21 year old male citizens is nothing more than a description of those eligible to vote at the time the Fourteenth Amendment was adopted. The Equal Protection Clause "is not shackled to the political theory of a particular era". *Harper v. Virginia State Bd. of Elections,* (1966) 383 US 663, 669, 16 L ed 169, 174, 86 S Ct 1079, 1083.

Professors Freund and Cox of Harvard Law School point out that Section 2 was directed at restriction of the franchise and had nothing to do with enlargement, "as is apparent from state laws reducing the voting age below 21. The most that can be inferred is that in 1866-68 Congress and the State legislatures were willing to accept 21 years as a reasonable measure of the maturity and responsibility necessary to vote *at that time.*" They go on to say that it "is nowise inconsistent to conclude that *in our time* a 21 year requirement unreasonably discriminates against eighteen, nineteen and twenty year olds because of changed conditions . . ." New York Times, April 12, 1970, Section IV, p. 131.

As to the legislative history of this section, see, Van Alstyne, *The Fourteenth Amendment, The 'Right' to Vote, and the Understanding of the Thirty-Ninth Congress,* 1965, The Supreme Court Review 33.

Regarding Congressional power to abrogate state voting restrictions, Paul A. Freund, Professor of Law at Harvard, notes: "The question for Congress is essentially the same, whether the exclusion be on criteria of sex,[3] residence, literacy or age. (Cong. Rec., daily ed., 91st, 2d, March 11, 1970, S 3503).

In *Harper v. Virginia State Bd. of Elections* (1966) 383 US 663, 16 L ed 2d 169, 86 S Ct at 1079, the Supreme Court, overruling *Breedlove v. Suttles,* 302 US at 277, 82 L ed at 252, 58 S Ct at 205, held that a $1.50 poll tax imposed by the State of Virginia was unconstitutional. Citing *United States v. Classic* (1941) 313 US 299, 314-315, 85 L ed 1368, 1376, 61 S Ct at 1031), the court noted that the right to vote in congressional elections is conferred by Art. I, Sec. 2 of the Constitution. (383 US at 665, 16 L ed 2d at 171, 86 S Ct at 1080.) Without deciding the question the court notes that the right to vote in state elections, although nowhere expressly conferred, may be implicit in the Constitution, particularly by reason of the First Amendment. (383 US at 665, 16 L ed 2d at 171, 86 S Ct at 1080.) "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment". (383 US at 665, 16 L ed 2d at 171, 86 S Ct at 1081.)

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[3]Professor Freund here refers to his earlier conclusion that Congress had the power by simple legislation to grant the vote to women (Cong. Rec., daily ed., 91st, 2d, March 11, 1970, S 3503).

With respect to the protection of voting rights against state laws concerning voting qualifications, the court concludes as follows:

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.
>
> 383 US at 670, 16 L ed 2d at 174, 86 S Ct at 1083.

The court also notes that the boundaries for the application of the Equal Protection Clause must change to meet modern conditions.

> We agree of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (Lochner v. New York, 189 US 45, 75, 49 L ed 937, 949, 25 S Ct at 539). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See Malloy v. Hogan, 378 US 1, 5-6, 12 L ed 2d 653, 657, 658, 84 S Ct 1489. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and

treatment that the Fourteenth Amendment commands. Plessy v. Ferguson, 163 US 537, 41 L ed 256, 16 S Ct 1138. Seven of the eight Justices then sitting subscribed to the court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the "separate-but-equal" doctrine of Plessy as respects public education, we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." Brown v. Board of Education, 347 US 483, 492, 98 L ed 873, 880, 74 S Ct 686, 38 ALR 2d 1180.

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required. Reynolds v. Sims, supra, 377 US at 566, 12 L ed 2d at 529.

383 US at 669-670, 16 L ed 2d at 174, 86 S Ct 1082-1083.

White v. Crook, (D.C. Ala 1966) 251 F. Supp. 401 held that an Alabama statute denying women the right to serve on juries violated the Equal Protection Clause of the Fourteenth Amendment. It was immaterial that the framers of the Fourteenth Amendment might not have foreseen the result reached by the court.

The argument that the Fourteenth Amendment was not historically intended to require the states

> to make women eligible for jury service reflects a misconception of the functioning of the Constitution and this court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society.
>
> 251 F. Supp. at 408.

The fact that many state legislatures were malapportioned in the early days of the nation did not place that condition forever behind the reach of constitutional prohibition. The antiquity of the practice did not cause the Supreme Court to refrain from invalidating malapportionment under the Equal Protection Clause. As noted in *Levy v. Louisiana* (1968) 391 US 68, 71, 20 L ed 2d 436, 439, 88 S Ct 1509, 1511, the high Court has not hesitated to strike down classifications which had history and tradition on their side. Mr. Justice Holmes stated:

> With regard to that, we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it had taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in

the light of our whole experience, and not merely in that of what was said a hundred years ago. *Missouri v. Holland* (1920) 252 US 416, 433, 64 L ed 641, 648, 40 S Ct 382, 383.

"We must never forget" said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat 316, 407 (4 L ed 579, 602), "that it is a constitution we are expounding."

Otsuka v. Hite (1966) 64 C. 2d 596 involved the question of whether bona fide conscientious objectors who had pleaded guilty to a violation of the Federal Selective Service Act could constitutionally be treated as persons convicted of an "infamous crime" and hence rendered ineligible to vote by the California Constitution. The California Supreme Court held that to preserve its constitutionality, the "infamous crime" voting restriction of the California Constitution must be limited to conviction of crimes involving moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process. (64 C. 2d at 599). No compelling interest was served by denying plaintiffs the vote.

The principle that state voter laws qualifying the right to vote are unconstitutional unless necessary to promote a compelling state interest was perhaps not clearly promulgated by the United States Supreme Court until the 1969 decision in the *Kramer* case. Nevertheless in 1966 in the *Otsuka* case the California Supreme Court noted that voting is a fundamental right and that in ruling on the validity of state im-

posed restrictions on this right, the United States Supreme Court has "in effect tended to apply the principle that the state must show it has a compelling interest in abridging the right". (64 C. 2d at 602).

The California Supreme Court also noted the high Court's "ever increasing recognition of the importance of this right" (64 C. 2d at 601):

> Thus "this court has stressed on numerous occasions, 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' *Reynolds v. Sims,* 377 US 533, 555 (84 S Ct 1362, 1387, 12 L ed 2d 506, 523). The right is fundamental 'because preservative of all rights' *Yick Wo v. Hopkins,* 118 US 356, 370 (6 S Ct 1064, 1071, 30 L ed 220, 226)." (*Harman v. Forssenius* (1965) 380 US 528, 537 (85 S Ct 1177, 14 L ed 2d 50).) Such matters are "close to the core of our constitutional system" (*Carrington v. Rash* (1965) supra, 380 US 89, 96) and "vital to the maintenance of democratic institutions" (id. at p. 94, quoting from *Schneider v. New Jersey,* 308 US 147, 161 (60 S Ct 146, 84 L ed 155).) (See also *United States v. Mississippi* (1965) 380 US 128, 144 (85 S Ct 808, 13 L ed 2d 717) ("the right to vote in this country is . . . precious"); *Louisiana v. United States* (1965) 380 US 145, 153 (85 S Ct 817, 13 L ed 2d 709) ("The cherished right of people in a country like ours to vote"); and, finally, the recent case of *Harper v. Virginia State Bd. of Elections* (1966) supra, 86 S Ct 1079, 1083, 16 L ed 2d 169, 175 ("the right to vote is . . . precious . . . fundamental").) Rather than being a creature of the California Constitu-

tion, the right of suffrage in this as in every other state of the Union flows from the well-springs of our national political heritage.

64 C. 2d 601-602.

In a recent unanimous decision voiding California's English literacy tests as to those literate in Spanish, the California Supreme Court states:

"Commencing with the reapportion decisions following *Baker v. Carr* (1962) 369 US186 (7 L ed 2d 663, 82 S Ct 691), the high court has given ever-increasing recognition to the importance of the franchise and has abandoned the tolerance of *Lassiter* in favor of strict scrutiny of restrictions on it."

Castro v. State of California (1970) 2 C. 3d 223, 234.

The court in the *Castro* case further notes that *Reynolds v. Sims,* (1964) 377 US 533, 84 S Ct 1362, 12 L ed 2d 506, "signalled the end to approval of restrictions on the right to vote once a rational connection between the constraint and a legitimate state policy was demonstrated" (2 C. 3d at 234); that *Carrington v. Rash,* (1965) 380 US 89, 85 S Ct 775, 13 L ed 2d 675 "for the first time held state voter qualifications subject to the equal protection clause" (2 C. 3d at 234); that "the clear implication of *Harper* is that more than 'rationality' must be demanded of state voter qualifications" (2 C. 3d at 235); and that *Kramer v. Union School District* (1969) 395 US at 621, 89 S Ct at 1886, 23 L ed 2d at 583 announced "a new constitutional standard" (2 C. 3d at 235).

Two different tests have been used to determine the validity of a state statute under the Equal Protection Clause. The traditional test, according to the dissent in the *Kramer* case, is whether the classification rests on grounds wholly irrelevant to achievement of the regulation's objectives. (395 US at 636, 23 L ed 2d at 595, 89 S Ct at 1894.) Under this test it is sufficient to sustain the validity of the statute if the classification is rationally related to a permissible legislative end. (395 US at 637, 23 L ed 2d 595-596, 89 S Ct at 1895.) As noted in *Levy v. Louisiana* (1968) 391 US 68, 71, 20 L ed 2d 436, 439, 88 S Ct 1509, 1511, in applying the Equal Protection Clause to social and economic legislation, the courts give great latitude to the legislature in making classifications.

This traditional test, however, is not applied to classifications touching upon fundamental rights. It is not applied to cases involving voting rights. The dissent in the *Kramer* case comments on the court's decision as follows: "Instead, it strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case . . ." (395 US at 638, 23 L ed 2d at 596, 89 S Ct at 1895.) It was not applied in *Levy v. Louisiana* (1968) 391 US 68, 71, 20 L ed 2d 436, 439, 88 S Ct 1509, 1511. It was not applied in *Shapiro v. Thompson,* (1969) 394 US 618, 22 L ed 2d 600, 89 S Ct 1322 involving the constitutionality of a one year residency requirement for receiving public assistance. Since that classification served to penalize the exercise of the constitutional right of interstate travel, the classification was unconstitu-

tional "unless shown to be necessary to promote a *compelling* governmental interest". (394 US at 634, 22 L ed 2d at 615, 89 S Ct at 1331.)

The dissent in the *Kramer* case notes that the majority opinion is "quite explicit" in explaining why the traditional equal protection standard is inapplicable to restrictions on the right to vote. (395 US at 639, 23 L ed 2d at 596, 89 S Ct at 1895.) The traditional test rests on the assumption that the state government fairly represents all the people. When the challenge to the statute is a challenge to that assumption, there can be no such assumption and the traditional test is inapplicable. (395 US at 628, 638-639, 23 L ed 2d at 590, 596, 89 S Ct at 1890, 1895.)

The reason given by the court in the *Kramer* case for the use of the compelling state interest test is particularly persuasive when applied to 18-20 year olds who have been "locked into a self-perpetuating status of exclusion from the electoral process". The plaintiff in the *Kramer* case participated in the election of the New York State Legislature which established the restrictions of which he complained.

Congressional inquiry as to whether the exclusion of 18-20 year olds from the franchise violated the Equal Protection Clause involved the same question asked by the court in the *Kramer* case: Is the exclusion from the vote of this group of citizens necessary to promote a compelling state interest. The same standard must be applied to the voting rights of citizens aged 18 through 20 years as has been applied to

the voting rights of other citizens.[4] The Equal Protection Clause would be self-contradictory if judicial or legislative standards for its application varied, not according to the right being asserted, but according to the class of persons asserting it.

III. A CONGRESSIONAL DETERMINATION THAT THE EQUAL PROTECTION CLAUSE FORBIDS THE DENIAL OF THE VOTE TO ANY GROUP OF CITIZENS IS CONCLUSIVE WHEN A BASIS CAN BE PERCEIVED FOR A CONGRESSIONAL FINDING THAT SUCH DENIAL IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST.

Kramer v. Union Free School District (1969) 395 US 621, 23 L ed 2d 583, 89 S Ct 1886 interprets the Equal Protection Clause of the Fourteenth

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[4]See *Hall v. Beals* (1969) 369 US 45, 24 L ed 2d 214, 90 S Ct 200, which involved a challenge to state durational residency requirements in presidential elections. The majority dismissed the case as moot since, inter alia, the state statute under attack had been amended to reduce the residency requirement in presidential elections from six to two months. Dissenting Justices Marshall and Brennan would have reached the merits and declared the residency requirement unconstitutional:

> But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon showing a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose.
>
> 369 US at ....., 24 L ed 2d at 220, 90 S Ct 203-204.

The argument is surely correct as far as it goes, and this court has often reaffirmed the power of the states to require their voters to be bona fide residents. Carrington v. Rash, 380 US 89, 93-94, 12 L ed 2d 675, 679, 85 S Ct at 775 (1965); Kramer v. Union School District, supra, at 625, 23 L ed 2d at 588: But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residency is questioned, but because they are recent rather than long-time residents.

369 US at ....., 24 L ed 2d 220-221, 90 S Ct at 204.

Amendment as forbidding the states from excluding from the franchise any group of its citizens, unless after exacting judicial scrutiny it is determined that such exclusion is necessary to promote a compelling state interest.

Katzenbach v. Morgan (1966) 384 US 641, 16 L ed 2d 828, 86 S Ct 1717 holds that under Section 5 of the Fourteenth Amendment, Congress has the power to grant the right to vote to any group of citizens, if a court can "perceive a basis" for a congressional conclusion that the Equal Protection Clause is violated. (384 US at 656, 16 L ed 2d at 838, 86 S Ct at 1726.)

Since the Equal Protection Clause is violated unless a compelling state interest is being promoted (*Kramer*) and Congress may act if a basis can be perceived for a conclusion that the Equal Protection Clause is being violated (*Katzenbach v. Morgan*), congressional action lowering the voting age to 18 years is constitutional if a basis can be perceived for a congressional finding that the exclusion of citizens aged 18 through 20 years is not necessary to promote a compelling state interest.

IV. AT THE VERY LEAST, A BASIS CAN BE PERCEIVED FOR A CONGRESSIONAL FINDING THAT THE DENIAL OF THE VOTE TO CITIZENS AGED EIGHTEEN THROUGH TWENTY YEARS IS NOT NECESSARY TO PROMOTE A COMPELLING STATE INTEREST.

An interest in denying the vote to 18-20 year olds because of the way 18-20 year olds may vote cannot be recognized as a legitimate state interest. The Supreme Court has stated:

> "Fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of rights so vital to the maintenance of democratic institutions," Schneider v. State, 308 US 147, 161, 84 L ed 155, 165, 60 S Ct 146, cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.
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> *Carrington v. Rash* (1965) 380 US 89, 94, 13 L ed 2d 675, 679, 85 S Ct 775, 779.

Likewise, the possible interest of a few incumbent state officers and legislators in denying the vote to 18-20 year olds cannot be recognized. The Supreme Court has stated the following regarding its duty to declare that state voting restrictions violate the Equal Protection Clause:

> We are admonished not to restrict the power of the states to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.
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> *Reynolds v. Sims,* (1964) 377 US 533, 566, 12 L ed 2d 506, 530, 84 S Ct 1362, 1364.

The interest of incumbent state officials and legislators against the protection of voting rights has been a reason for Federal judicial protection of those rights. The court in *Reynolds v. Sims* realized that it

was required to order equal districting because "No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available." (377 US at 553, 12 L ed 2d at 522, 84 S Ct at 1377.) Likewise, the principle of the *Kramer* case that only a compelling state interest justifies denial of the right to vote may be based on the fact that those who do not have the vote have difficulty in exerting sufficient political pressure to obtain it.

Minors, idiots, insane persons, and those unable to read the Constitution and write their names are coupled together in the California Constitution. (*Otsuka v. Hite* (1966) 64 C. 2d 596, 602.) All those under the age of 21 years, like "mental defectives and illiterates are deemed unfit to vote because they are lacking in the minimal understanding and judgment necessary to exercise the franchise." (*Otsuka v. Hite*, 64 C. 2d at 602.) To classify those between the ages of 18 - 20 years with mental defectives and illiterates is unreasonable. Mental defectives and illiterates are not considered fit for military service. Eighteen through 20 year olds today bear the greater part of the national burden of compulsory military service and all 18 year old males must register for military service.

Elaborate qualifications for voters are incompatible with our nation's commitment to full and equal participation in political life. Only standards limited to insuring "a minimal degree of competence and capacity" are in furtherance of a permissible state

interest. (*Castro v. State of California* (1970) 2 C. 3d at 240.) The *Castro* case holds that the interest of the State of California in excluding those who, because of English illiteracy have no access to magazines, newspapers, and other materials written in English, although perhaps based on desirable state policy, is not sufficiently compelling to justify the denial of the vote to those literate in Spanish. (2 C. 3d at 240.)

The Equal Protection Clause stems from "our American idea of fairness" and is "a more explicit safeguard of prohibited unfairness than 'due process of law'". (*Bolling v. Sharpe* (1954) 347 US 497, 499, 98 L ed 884, 886, 74 S Ct 693, 694.) What could be more unfair or undemocratic than the fact that the majority of those conscripted to fight our wars are not allowed to participate in the selection of the President or the Congress who decide whether the nation shall wage war and who determine the methods used to raise military forces. The "one man, one vote" principle should apply to the class of citizens who supply most of the nation's military manpower.

A concept of fairness important to most Americans was once expressed in the cry that taxation without representation is tyranny. Theodore Sorenson testified: "If taxation without representation was tyranny, then conscription without representation is slavery". (*Lowering the Voting Age to 18,* Hearings before the Subcommittee on Constitutional Amendments, Committee of the Judiciary, United States Senate, 91st, 2d, February 16, 1970, p. 15.) Dwight

Eisenhower opposed "sacrifice without representation." Abraham Lincoln said "I go for all sharing the privileges of the government who bear its burden."

Our nation imposes upon 18 - 20 year olds, not only the same burdens of citizenship and responsibilities as are imposed upon others, but the additional burden of compulsory military service. The national burden of compulsory military service—by far the heaviest burden of United States citizenship—now falls for the most part on those aged 18 through 20 years. It seems inconceivable in America that such a heavy burden could be placed by elected officials on a class of citizens who are not permitted to vote.

Prior to World War II, the burden of compulsory military service was placed almost entirely on those who had attained the age of 21 years.

The Conscription Act of 1863 constituted all able-bodied male citizens between 20 and 45 years of age as "the national forces" liable to military service. (Act of March 3, 1863, Sec. 1; 12 Stat. 731.) Eighteen and 19 year olds were not subject to the draft during the Civil War.

The Selective Draft Act of 1917 provided for liability for military service of all male citizens between the ages of 21 and 30. (Act of May 18, 1917; 40 Stat. 76.) It was not until less than two and one-half months before the end of World War I that the Act was amended providing, inter alia, that the age limit of liability for service be increased to 45 and that all males between 18 and 45 be registered. (Act of August 31, 1918; 40 Stat. 955-957; Joseph C.

Duggan, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service,* The Catholic University of America Press, 1946, p. 85.)

The Selective Training and Service Act of September 16, 1940, (the first peacetime draft) imposed liability for military service upon males between the ages of 21 and 36. (Sec. 3; 54 Stat. 885-886.) The draft age was not lowered to 18 until the fall of 1942. During World War II, the burden of the draft was carried by men of many different ages. Although they carried part of the burden, 18 - 20 year olds were not required to assume a disproportionate share.

The tendency since the end of World War II has been to place an ever-increasing proportion of the burden on those under the age of 21 years. On November 26, 1969, the President established the present system of the random selection of 19 year olds by birthdate. (Proclamation No. 3945, 34 Fed.Reg. 19017.) In April of 1970, the President issued an executive order eliminating all future occupational and farm work deferments and all future fatherhood deferments except where a local draft board determines that extreme hardship exists. On the same date, the President sent a special message to Congress stating that student deferments "are no longer dictated by the national interest" and requesting authority to eliminate all future student deferments (San Francisco Chronicle, April 24, 1970, pp. 1, 26). The proportion of the military burden borne by those

under the age of 21 years will increase further as a result of these measures.

There is every reason to believe that the nation will continue to do what it is now doing. It will look primarily to its 18 - 20 year olds to satisfy its military manpower needs. No golden era of peace is at hand. It seems likely that the nation will continue to be involved in wars and that 18 - 20 years olds will be asked to carry most of the burden. Those aged 18 through 20 years have heretofore not been permitted to participate in the election of the Presidents of the United States, who, as Commanders in Chief of the Armed Forces, have involved this country in a war on the Asian mainland. Nor have they participated in the election of the Congressmen who have enacted the draft laws that have placed most of the burden of fighting this war on them. Since World War II the American concept of citizen soldiery has, for the most part, become conscription of those who lack full privileges of citizenship.

It is significant that the determination of Congress that 18 - 20 year olds are being denied the equal protection of the laws includes a specific finding that the denial of the vote to 18 - 20 year olds is "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens." (Title III, Sec. 301(a)(1).)

Since World War II, most of the military burden has been shifted to those under 21. During this period, the nation has involved itself in the Korean and Viet

Nam wars, which, unlike World War II, have been several steps removed from repelling an attack on this country. A progressively smaller sacrifice has been made by other age groups in these wars. According to the April 28, 1969 issue of U.S. News and World Report, 44% of the approximately 34,000 U.S. servicemen killed by hostile action from January 1, 1961 to January 1, 1969, were under the age of 21 years. Since 21-year-olds suffered another 15% of these deaths, it is reasonable to conclude that well over 50% of these deaths were incurred by those who entered the armed forces before reaching the age of 21 years. The following figures are given by U.S. News and World Report:

Age	Deaths	Age	Deaths
17	9	22	2507
18	1948	23	1929
19	5133	24	1447
20	8033	25	1073
21	4973	26	736
		27	440

The percentage of those killed in Southeast Asia under the age of 21 years has increased from 44% at the end of 1968 to 48% at the end of 1969. (Appendix, Section IV, p. ix).

The burden of military service is by its nature a burden of manhood to be carried by the strong and courageous. The Equal Protection Clause, stemming as it does from the American concept of fairness, must at the very least provide a basis for a Congressional determination to abolish a classification which

denies the full privileges of citizenship, on the claimed ground of immaturity, to the class of citizens who carry most of the nation's military burden.

Richard Poirier in his essay *The War Against The Young* says "We have used youth as a revenge upon history, as the sacrificial expression of our self-contempt . . . War, the slaughter of youth at the apparent behest of history, is the ultimate expression of this feeling" (*Natural Enemies?; Youth and the Clash of Generations,* a Collection of Essays, J. B. Lippincott & Company, 1969, p. 188). The shameful conscription and sacrifice of America's youth without representation has served to undermine the legitimacy of representative government in the United States.

The National Commission on the Causes and Prevention of Violence states as follows:

> We demand the ultimate service, the highest sacrifice, when we require them to perform military service. Many young men have become battle-tried veterans and some have died on the battlefield before they could vote. Their way of life—and, for some, even the duration of life itself—is dictated by laws made and enforced by men they do not elect. This is fundamentally unjust.
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> *Commission Statement On Challenging Our Youth;* reprinted in Lowering the Voting Age to 18, Hearings before the Subcommittee on Constitutional Amendments, Committee of the Judiciary, United States Senate, 91st 2d, 311, 314.

The anachronistic voting age-limitation tends to alienate them from systematic political processes

> and to drive them into a search for alternative, sometimes violent, means to express their frustrations over the gap between the nation's ideals and actions. Lowering the voting age will not eliminate protest by the young. But it will provide them with a direct, constructive, and democratic channel for making their views felt and for giving them a responsible stake in the future of the nation.
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> id at 315.

The military origin of the age of 21 years as the age of majority is accepted by most historians. There is strong authority for the view that the age of 21 years was directly linked with the ability to hold up a heavy suit of armor and lift a lance at the same time (*Report of the Committee on the Age of Majority Presented to the English Parliament,* p. 21, para. 38). There is also a view that suits of armor were too expensive to be furnished to those under the age of 21 years who might grow out of them. Twenty-one years, the knightly age of majority, filtered down and became the universal age of all classes (T. E. James, *The Age of Majority,* The American Journal of Legal History, Vol. 4, 1960).

From a military standpoint, our nation has abandoned the knightly age of majority in favor of the age of 18 years. The age of 21 years lingers only as an excuse for withholding full citizenship rights from 18-20 year olds.

The age of knighthood was based on physical maturation. Scientific studies show that the age of physical

maturity has decreased from three to five years in the last one hundred years and that today's eighteen-year olds are physically and biologically older than the twenty-one years olds of most of America's history. (J. M. Tanner, *Earlier Maturation of Man*, Scientific American, Jan. 1968, Vol. 218, No. 1). The nation has expressed this conclusion in the enactment and administration of the draft laws as well as in the passage of Title III of the Voting Rights Act Amendments of 1970.

The State of California, like the Federal government, has recognized that 18 years is an age of majority under present social and economic conditions. (Appendix, Section I, p. i, "Legal Significance of Attaining the Age of Majority of Eighteen Years in the State of California.") Criminal responsibility in the adult courts at the age of 18 years without the right to sit on juries until the age of 21 years has unfortunately followed the discriminatory pattern of imposing burdens at age 18 without extending corresponding privileges until age 21.

The general power of the states to establish voting age qualifications is not questioned. However, the authority to establish any qualification upon the right to vote is subject to the Equal Protection Clause and the enforcement power of Congress. A voting age qualification, like any other voting qualification, is superseded by Congressional action if a basis can be perceived for a Congressional conclusion that such qualification is not necessary to promote a compelling state interest.

The exclusion of citizens between the ages of 40 to 50 or over the age of 65, 70 or even 80 years would be unconstitutional. In view of our nation's history, exclusion from the vote on the basis of age of any group of citizens who had reached the age of 21 years would probably be unconstitutional.

There is no case authority as to how low must be the age of voting to comply with the Equal Protection Clause. There is surely Constitutional protection and such protection, even in the absence of Congressional action, in all probability extends to all those who have reached the age of 21 years.[5] Congress has decided to extend that protection to all those who have reached the age of 18 years.

Under present conditions, Congress would not have the authority to establish a voting age below 18 years. Citizens below the age of 18 years are not required to assume any special burdens of citizenship. They are not yet subject to the draft and generally are not tried in the adult criminal courts. Most of them do not complete their high school education before they they reach the age of 18 years. The big jump in the percentages of those working full time, married, and in the armed forces does not come until age 18 (Appendix Section II, p. v).

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[5]No person who has attained the age of 21 years has ever been denied the vote on the basis of age by any state.

The Report of the Committee on the Age of Majority Presented to the English Parliament, July 1967, page 36, paragraph 116, discusses the case of raising the age of majority above 21 as follows: "we have received only one piece of evidence advocating this: its laconic splendor should not be lost to history. Written from a London club, signature indecipherable, it reads in its entirety, 'Sir, re Age of Majority. 21 is wrong. 50 is right. Verb. Sap. Yours faithfully.' "

The ages of 18 and 21 are the only logical minimum voting ages. The ages of 19 and 20 years have no particular legal significance under California or Federal law. It is at the age of 18 years that California citizens are liable for military service and are treated as adults in the criminal courts. A state legislature might compromise at a voting age of 20 or 19 years but these are only way stations on the road from tradition to justice. As a legal matter, those between the ages of 18-20 years are a distinct group upon whom has been imposed burdens without corresponding rights.

The California Supreme Court has declared that the interest which the State of California claims to be protecting in denying the vote to 18-20 year olds is to protect the ballot from persons "lacking in the *minimal* understanding and judgment necessary to exercise the franchise" (*Otsuka v. Hite* (1966) 64 C 2d 596, 602), and that the "only permissible purpose" which a literacy test serves is to limit the electorate to those "thought capable of *some* degree of intelligence and independence". (*Castro v. State of California* (1970) 2 C 3d at 237.) (Emphasis added.) The permissible state interest is limited to "establishing standards which tend to insure *a minimal* degree of competence and capacity." (Emphasis added.) (2 C 3d at 240.)

Certainly a basis can be perceived for a Congressional conclusion that 18-20 year olds do not lack the minimal understanding and judgment necessary to exercise the franchise. In fact, the case that today's 18-20 year olds have the necessary understanding and

intelligence is overwhelming. The following must be considered: (1) It is scientifically demonstrable that the age of maturity has decreased from three to five years within the last 100 years, and that today's 18 years olds are biologically older than the 21 year olds of most of America's history (J. M. Tanner, *Earlier Maturation of Man,* Scientific American, Jan. 1968, Vol. 218, No. 1), (2) large percentages of 18-20 year olds are in the labor force, married, pay taxes, have assumed the responsibilities of parenthood (Appendix, Section II, p. v); (3) approximately 87.7% of California youth and 81% of the nation's youth today complete high school whereas only 6% did so in 1900; (Senator Barry Goldwater, 116 Cong. Rec. 3216 (daily ed., March 9, 1970) Ap. p. 68); National Educational Association *Rankings of the States,* 1970, p. 28; United States Office of Education, *Digest of Educational Statistics,* 1968, p. 52); (4) In California, 18-20 year olds have a higher average level of schooling than any other age group (California Assembly Committee on Elections and Constitutional Amendments, *1969 Interim Report on Minimum Voting Age/Age of Majority,* p. 18); (5) According to many tests, today's 18-20 year olds are better informed concerning public affairs than are their elders. (Howell, Charles R., *Eighteen-to-Twenty-Year-Olds Surpass Adults in Political Quiz,* Cong. Rec., Vol. 100, 83rd, 2d March 5, 1954, p. A. 1777.)

The percentage of voters who have attained the age of 45 years has increased from below 25% in 1850 to in excess of 50% today. Lowering the voting age

to 18 years would still leave the electorate far older than during most of our nation's history:

The Department of Justice has stated:

> One of the clearest indications that 18 year olds are sufficiently mature to take part in and contribute to the electoral process is the experience in Georgia and Kentucky, where such persons have been eligible to vote for many years. Senator Cook described the experience in Kentucky, where the voting age has been 18 since 1955, as a "complete success." 116 Cong. Rec. 3215 (daily ed., March 9, 1970). Regarding the four states which permit persons below age 21 to vote, Senator Kennedy stated the following (Senate Const. Rights Hearings, p. 324; 116 Cong. Rec. 3058 (daily ed., March 5, 1970 (Ap. p. 64)):
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> "Today, four states—Georgia since 1943, Kentucky since 1955, and Alaska and Hawaii since they entered the Union in 1959—grant the franchise to persons under 21. There is no evidence that the reduced voting age has caused any difficulty whatever in the states where it is applicable. In fact, former Governors Carl Sanders and Ellis Arnall of Georgia have testified in the past that giving the franchise to 18 year olds in their states has been a highly successful experiment."
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> (Memorandum of Points and Authorities in support of Motion for Summary Judgment, *Christopher v. Mitchell,* Civil Action 1862-70, United States District Court for the District of Columbia, p. 62.)

The people of Alaska have recently voiced their satisfaction with their experience in permitting those

under 21 to vote. On August 25, 1970, they voted to lower the voting age in Alaska from 19 to 18.

Congress knew that in the last decade the voting age has been reduced to 18 years in Great Britain,[6] West Germany, Israel, Mexico, in many of the Canadian provinces and Swiss cantons throughout Latin America, and in many other countries, including even South Viet Nam.

The *Castro* decision notes that the use of judicial scrutiny, as applied to the denial of voting rights, requires the balancing of "the detriment imposed on those excluded from voting against the gain in the quality of the franchise to be expected from their exclusion." (2 C 3d at 233.) The state interest in denying the vote to English illiterates who were literate in Spanish was "hardly so compelling that it justifies denying the vote to a group of United States citizens who already face similar problems of discrimination and exclusion in other areas and need a political voice . . ." (2 C 3d at 240.) The dissent in the *Kramer* case points out that the reasoning of the

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[6]During the debate in the English Parliament, Mr. Richard said (774 H.C. Deb. (5th ser.) 341 (1968)):

"If one attempts to equate maturity with the age of voting, one is bound to run into difficulties, because, clearly, there are sections of the adult population who would not be entitled to take part in an election if they first had to pass a maturity test of responsibility or intelligence. I therefore utterly reject this equation of maturity with age.

What one ought to try to do is to arrive at a more sensible test as to the age at which people ought to be allowed to vote and I would suggest one very simple test. People ought to have the right to vote and to have a say about the way in which their lives are governed and in which their country is run, at the age at which society expects them to assume adult social responsibilities."

majority is not only applicable to age, residency and literacy qualifications but in such cases would "weigh the interest of the person excluded from the voting . . ." (Footnote 11, 395 US at 641, 23 L ed 597-598, 89 S Ct 1896-1897.) (See also *Katzenbach v. Morgan* (1966) 384 US at 653, 16 L ed 2d at 837, 86 S Ct 1724-1725.) Citing *Williams v. Rhodes* (1968) 393 US 23, 30, 21 L ed 2d 24, 31, 89 S Ct 5, 10, the majority opinion in the *Kramer* case notes that consideration must be given to "the interests of those who are disadvantaged by the classification." (395 US at 626, 23 L ed 2d at 589, 89 S Ct at 1889.) *Evans v. Cornman,* (June 16, 1970) 38 Law Week 4511, 4513, and *City of Phoenix v. Kolodziejski* (June 23, 1970) 38 Law Week 4596, conclude that judicial protection of a citizen's right to vote may depend on his "stake" and the burdens he is required to assume.

Certainly a basis can be perceived for a Congressional conclusion that the claimed immaturity of 18-20 year olds does not furnish a basis for a state interest sufficiently compelling to overcome the detriment imposed on them by the denial of the vote. Conscription without representation is an enormous detriment. Persons aged 18 through 20 years have a "stake" in participating in the election of the officials who decide whether our nation shall wage war and who determine the methods for raising manpower. This stake is so great that Congress on this basis alone could reasonably conclude that the states had no sufficiently compelling interest in denying them the vote.

Congress might also have considered that the interest of 18-20 year olds in compelling elected officials to act to preserve the environment is significantly greater than their elders. The following was noted regarding Governor Reagan's conference at Los Angeles on California's environment:

> Only the young seemed to feel any sense of urgency—for inaction now means they will watch their world being destroyed. The California media made it quite clear that those conferences would have been just further sessions of endless talk if it hadn't been for the youth who advanced specific proposals for action. (*The Environmental Handbook* prepared for the First National Environmental Teach-In, Ballantine Books, 1970, p. xiv of foreword by the Editor, Garrett DeBell.)

Congressman McCloskey, of the Eleventh California Congressional District (San Mateo County) says that among his constituents, 18-20 year olds are far more informed, knowledgeable and concerned about environmental problems than their elders. Congress might have concluded that the vigor and idealism of youth were needed to counterbalance the apathy that has allowed our nation to drift into its present environmental crisis.

> For the first time in history, the future of the human race is now in serious question. This fact is hard to believe, or even think about—yet it is the message which a growing number of scientists are trying, almost frantically, to get across to us.

Listen, for example, to Professor Richard A. Falk of Princeton and of the Center for Advanced Study in the Behavioral Sciences:

> The planet and mankind are in grave danger of irreversible catastrophe. . . . Man may be skeptical about following the flight of the dodo into extinction, but the evidence points increasingly to just such a pursuit. . . . There are four interconnected threats to the planet—wars of mass destruction, overpopulation, pollution, and the depletion of resources. They have a cumulative effect. A problem in one area renders it more difficult to solve the problems in any other area . . .

The Environmental Handbook at p. 138.

C. P. Snow thinks "our present unease may be a shadow thrown backwards from the future." (*The State of Siege,* 1968, Charles Scribner's Sons, p. 40).

The Voting Rights Act Amendments of 1970, Section 201 abolish all tests requiring a person to "demonstrate the ability to read, write, understand, or interpret any matter" as a prerequisite to voting in national or state elections. The fact that illiterates were to be permitted to vote in all elections must have been a factor causing Congress to question the exclusion from the vote of 18-20 year olds. Such exclusion could only be based on a claimed lack by 18-20 year olds of a "minimal degree of competence and capacity." (*Castro v. State of California* (1970) 2 C 3d 223, 240.) Yet no qualifications insuring any degree of competence or understanding were to be

required of those who had reached 21 years. Moreover, illiterates are deemed unfit for military service whereas 18-20 year olds today bear the greater part of that burden.

Congress was uniquely qualified to assess and weigh, not only the interests of the states and 18-20 year olds, but also the national interest in preserving the legitimacy of representative government throughout the United States. Senator Magnuson emphasized this point in a speech on the Senate floor (Cong. Rec., 91st, 2d, daily ed., March 11, 1970, S. 3476-3477).

Senator Barry M. Goldwater of Arizona states as follows:

> "[T]here simply is no compelling reason why a State has to deprive citizens who are between the ages of 18 to 21 of their right to vote. As I have discussed earlier in my statement, the only reason put forth to justify the present minimum of 21 is a distrust of the intelligence or maturity of young persons.
>
> "There is no rhyme or reason to either of these points in today's setting. They are based strictly on emotion rather than facts."
>
> *Lowering the Voting Age to 18*, Hearings before the Subcommittee on Constitutional Amendments, Committee of the Judiciary, United States Senate 91st, 2d, March 9, 1970, pp. 136-137.

Senator Goldwater's statement is in fact correct. However, the court need not decide its correctness in order to sustain the constitutionality of Title III. It

need only decide that a basis can be perceived for Senator Goldwater's conclusion that there is "no compelling reason why a State has to deprive citizens between the ages of 18 and 21 of their right to vote."

V. CONGRESSIONAL ACTION GRANTING THE RIGHT TO VOTE TO ANY GROUP OF CITIZENS MUST LIKEWISE BE UPHELD IF THE COURT CAN PERCEIVE A BASIS FOR A CONGRESSIONAL FINDING THAT THE INCREASED POLITICAL POWER RESULTING TO SUCH PERSONS FROM THE VOTE WILL BE HELPFUL IN OVERCOMING DISCRIMINATION AGAINST THEM AND THAT THIS NEED TO VOTE WARRANTS FEDERAL INTRUSION UPON STATE INTERESTS. HERE, AGAIN, THERE IS A PERCEIVABLE BASIS FOR SUCH A FINDING.

As noted in Section I of this argument, *Katzenbach v. Morgan* held that Section 4(e) of the 1965 Voting Rights Act was constitutional since it was "plainly adapted" to furthering the aim of overcoming discrimination in voting rights. *Katzenbach v. Morgan* also held that Section 4(e) was constitutional on the separate ground that it was "plainly adapted" to furthering the aid of overcoming discrimination in the provision and administration of governmental service. In this regard, the court states as follows:

> This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain "perfect equality of civil rights and the equal protection of the laws." It was well within congressional authority to say

that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did. There plainly was such a basis to support Section 4(e) in the application in question in this case. Any contrary conclusion would require us to be blind to the realities familiar to the legislators.

384 US 652-653, 16 L ed 2d 836-837, 86 S Ct 1724-1725.

Under the reasoning of the *Katzenbach v. Morgan* and *Kramer* cases, the constitutionality of Title III of the Voting Rights Act Amendments of 1970, as legislation "plainly adapted" at the elimination of discrimination in the imposition of voting qualifications, is not open to serious doubt. At the very least, a basis can be perceived for a Congressional finding that there is no compelling reason why the states must deny the vote to persons aged 18-20 years.

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Young people of this country have voiced the complaint of police and National Guard discrimination. To what extent there may be discrimination in law enforcement against young people in the various parts of the country is perhaps incapable of proof. Many claims of mistreatment are not justified. Nevertheless, enough substantial charges have been made, both in California and throughout the nation, to provide a basis for Congressional concern.

Senator Kennedy in his testimony before the Senate Subcommittee on Constitutional Amendments stated as follows:

> By reducing the voting age to 18, we can enable young Americans to improve their social and political circumstances, just as the Supreme Court in the Morgan case accepted the determination by Congress that the enfranchisement of Puerto Ricans in New York would give them a role in influencing the laws that protect and affect them.
>
> Although 18 - 20 year olds are not subject to the same sort of discrimination in public services confronting Puerto Ricans in New York, the discriminations, actual and potential, worked against millions of young Americans in our society are no less real.[7]
>
> Cong.Rec., daily ed., March 11, 1970, 91st, 2d, S. 3486.

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[7]"The view that the Equal Protection Clause of the Fourteenth Amendment was intended primarily to limit state restrictions on ethnic minorities, which was strongly urged by many, including some Justices of the Supreme Court, in the period immediately following its adoption, is a relic of the 19th Century. The Equal Protection Clause in recent years has been applied to many types

VI. FEDERAL LEGISLATION ESTABLISHING A UNIFORM NATIONAL VOTING AGE IS IN ANY EVENT CONSTITUTIONAL IN PRESIDENTIAL ELECTIONS AND PRIMARIES.

Section 202 of Title II of the 1970 Voting Rights Act Amendments provides for the elimination of durational residency requirements in presidential elections. Congress found that the imposition and application of durational residency requirements in presidential elections "denied and abridged the inherent constitutional right(s) of citizens to vote for their president and vice-president" and "to enjoy their free movement across state lines." (Title II, Sec. 202(a)).

Congress, in the enactment of Sec. 202 of Title II, recognized that there is no provision in the Constitution requiring that voters in presidential elections have the same qualifications as other voters. The Constitution is in fact silent as to the qualifications of voters in presidential elections.

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of state legislation having no relation to ethnic minorities. Therefore, to argue that the doctrine of *Katzenbach v. Morgan* should be contained in this way is to argue for a restriction that does not appear in the Court's statement of the doctrine, and more importantly, to suggest a limitation of at least one aspect of the Fourteenth Amendment by returning to a view that was rejected in the 19th century." 116 Cong. Rec. S. 7279 (daily ed., May 18, 1970) (letter of Prof. Kaufman).

"Possibly, the [*Katzenbach v. Morgan*] case will be explained away upon the ground that the discrimination was invidious because it ran against Puerto Ricans. But that is not what the court held and if a Congressional finding that residency and literacy tests work a denial of equal protection would be binding upon the courts, then logically a finding that the present discrimination against 18-21 year olds is invidious should be equally conclusive." (Statement of Archibald Cox, *Lowering the Voting Age to 18*, Hearings before the Subcommittee on Constitutional Amendments, Committee of the Judiciary, United States Senate, 91st, 2d, pp. 177-178.)

Even if the court were to reject all arguments heretofore presented in this brief, there must still be determined the question of whether because of additional considerations, Title III is in any event constitutional as to presidential elections.

There are indeed significant additional considerations applicable to presidential elections. Senator Joseph Tydings states the following:

> Additional arguments can be made in favor of the constitutionality of congressional legislation lowering the voting age when the legislation is not applicable to the election of State and local officials. . . . Any interest which a State may have in denying the right to vote to a class of citizens would certainly be entitled to less consideration when only Federal elections are involved. The Court could not presume a national interest in denying the vote to a class of citizens if the Congress of the United States had concluded that the national interest lay in having that class vote in Federal elections.
>
> Cong. Rec., daily ed., 91st, 2d, March 11, 1970, S. 3498.

Whatever interest a state might claim in preventing 18-20 year olds from voting would certainly be entitled to far less consideration in presidential elections than in local, state, or even congressional elections. The Congress of the United States has concluded that the national interest requires that 18-20 year olds vote for the nation's chief executive officers. Accordingly, the states can have no compelling interest in preventing these United States citizens from voting for their president and vice president.

Congress could also consider that a uniform national voting age was "appropriate legislation" under Section 5 of the Fourteenth Amendment to do away with discrimination in voting rights in presidential elections among citizens of the same age who reside in different states. The minimum age for voters in presidential elections is 18 in Georgia, Kentucky, and Alaska, and 20 in Hawaii. It will be 18 years in the District of Columbia commencing January 1, 1971. (There is no dispute about Congressional power under Article I, Section 8, to establish voting qualifications in the District of Columbia).

Congress might also reasonably conclude that a national uniform voting age in presidential elections was needed to protect the inherent constitutional rights of citizens "to vote for their president and vice president" and "to enjoy their free movement across state lines". Legislation for this purpose is authorized by the Necessary and Proper Clause and is "appropriate legislation" to enforce the Privileges and Immunities Clause of the Fourteenth Amendment. In view of the abolition of durational residency requirements, were it not for the provisions of Title III, a United States citizen aged 18 through 20 years would gain or lose his right to vote for president and vice president by transferring his place of residence from certain states to others.

The doctrine of reserved powers expressed in the Tenth Amendment is limited to those powers which the states possessed before the establishment of the Constitution. (*United States v. Curtis Wright Export*

Corporation (1936) 299 US 304, 316, 81 L ed 255, 260, 57 S Ct 216, 219.) The doctrine of reserved power has no application to legislation regulating congressional elections. (*Ex Parte Yarborough* (1884) 110 US 651, 666, 28 L ed 274, 279). In *Ex Parte Yarborough* it was held to be "a waste of time to seek for specific sources of power" to pass laws to protect congressional elections from violence and corruption (110 US 651, 666, 28 L ed 274, 279). *Burroughs v. United States of America* (1933) 290 US 534, 78 L ed 484, 54 S Ct 287 applied the same doctrine to presidential elections.

Because the doctrine of reserved powers is inapplicable to presidential elections, the general power to establish qualification for voters in presidential elections and primaries necessarily resides in the Congress of the United States (regardless of any specific source of power such as Section 5 of the Fourteenth Amendment) unless there can be found a specific contrary provision in the Constitution. The Constitution, however, is silent as to the qualification of voters in presidential elections or primaries. The Constitution merely provides for the election of the president by members of an Electoral College consisting of delegations from each state appointed "in such manner as the Legislature thereof may direct." (Art. II, Sec. 1, par. 2).

The practices of direct presidential elections and presidential primaries grew up despite the Constitution. The Twenty-Fourth Amendment contains the only language in the Constitution referring to either

direct presidential elections or presidential primaries. It provides that the "right of citizens of the United States to vote in any primary or other election for president or vice president, for electors for president or vice president . . ." shall not be abridged by reason of failure to pay any poll tax or other tax.

In California, as in most other states, the candidates for election to the Electoral College are appointed by state political party conventions. Their names do not appear on the ballot. Only the names of the candidates for president and vice president appear on the ballot. The members of the Electoral College perform only mandatory ministerial acts since California law directs that they must vote for the candidates of the political party they represent (Election Code Sec. 25105).

The power of the state legislatures to determine the "Manner" of selection of the members of the Electoral College authorizes a determination that popular election shall be the manner of selection. (*McPherson v. Blacker* (1892) 146 US 1, 36 L ed 869.) Once this determination has been made, however, Congress has the authority to establish voter qualifications.

The authority of Congress under Article I, Section 4, to make or alter regulations regarding the "Manner" of holding congressional election has not been interpreted as including a power to alter state voter qualifications. Likewise, the authority of state legislatures under Section 1 of Article II to appoint members of the Electoral College in such "Manner"

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in presidential elections and primaries need n
based on Section 5 of the Fourteenth Amendm
any specific provision of the Constitution.

CONCLUSION

For the foregoing reasons, it is requested th
Title III of the Voting Rights Act Amendments
1970 be declared constitutional.

Dated, September 8, 1970.

Respectfully submitted,
JORGENSON, COSGROVE & FLICKINGER,
By JOHN R. COSGROVE,
Attorneys for Amici Curiae.

(Appendix Follows)

Appendix

SECTION I

LEGAL SIGNIFICANCE OF ATTAINING THE AGE OF MAJORITY OF EIGHTEEN YEARS IN THE STATE OF CALIFORNIA.[1]

1. Although proceedings may be commenced in the juvenile court if the alleged offender was between the ages of 18 and 20 years at the time of the offense, such proceedings are usually commenced and prosecuted to completion in the adult courts. Proceedings must be commenced in the juvenile court only if the alleged offender was below the age of 18 years at the time of the alleged offense. (California Juvenile Court Practice, California Continuing Education of the Bar, pp. 35-36).

2. Registration for the draft is required by Federal law at the age of 18 years. (50 USC 453).

3. Any married person who has attained the age of 18 years is of the age of majority for all purposes of the Civil Code, Probate Code and the Code of Civil Procedure and for the purpose of entering into any engagement or transaction respecting property or his estate, or for the purpose of entering into any contract, the same as if he or she had reached 21 years, (Civil Code 25). Judgment of dissolution or nullity of the marriage prior to the age of 21 does not deprive the person of adult station once obtained under this provision.

[1]There are two ages of majority in California. These are 18 and 21 years. There is no legal significance in attaining the ages of 19 or 20 years under Federal or California laws.

4. Any woman who has reached the age of 18 years is capable of consenting to and consummating marriage. No parental consent or court approval is required. (Civil Code, Sec. 4101).

5. Any man who has reached the age of 18 years is capable of consenting to and consummating marriage with the consent in writing of his parents or one of his parents. No court approval is required (Civil Code, Sec. 4101).

6. No person who has reached the age of 18 years may disaffirm any contract on the ground of age unless he restores all consideration received by him. (Civil Code, Sec. 35). The consideration which must be restored includes a sum equal to the value of the use or deterioration of the article while it was in his possession. (26 Cal. Jur. 2d 664-665).

7. Any person who has reached the age of 18 years may give consent to the donation of blood. (Civil Code, Sec. 25.5).

8. Any married person or serviceman may consent to medical care. (Civil Code Sec. 25.6 and 25.7), and any unmarried pregnant woman may consent to medical care relating to her pregnancy. (Civil Code, Sec. 34.5).

9. Those who have attained the age of 18 years may purchase tobacco. (Penal Code, Sec. 308).

10. Persons who have reached the age of 16 years have full legal capacity to purchase life and disability insurance and annuity contracts. (Ins. Code, Sec. 10112).

11. Persons who have reached the age of 18 years may drive motor vehicles for compensation and may drive school buses. (V. C. Sec. 12515, 12516).

12. Persons who have reached the age of 18 years have the capacity to make valid wills and exercise testamentary powers of appointment. (Probate Code, Sec. 20 and Civil Code, Sec. 1384.1).

13. The provisions of Fair Labor Standards Act regarding "oppressive child labor" apply only to those under the age of 16 years or between the ages of 16 and 18 years. (29 USC 203(1) and 212).

14. The Department of Labor of the State of California has no authority to fix minimum wages or maximum hours for males between 18 and 21 years of age. (Labor Code, Sec. 1172).

15. Vehicle licenses issued to persons under the age of 18 years are governed by special provisions requiring satisfactory completion of driver education courses. (V. C. Sec. 12507).

16. Eighteen years is the minimum age for employment by the United States Government.

17. Those who have attained the age of 16 years have capacity to enter into apprentice agreements under the Apprentice Labor Standards Act. (Labor Code, Sec. 3077).

18. Females who have reached the age of 18 years are not protected by statutory rape laws, (Penal Code, Sec. 261) or the laws relating to the abduction of females for purposes of prostitution. (Penal Code. Sec. 267).

19. Those who have reached the age of 18 years may purchase automobile insurance with the same effect as though they had reached the age of 21 years. (Ins. Code Sec. 152).

20. The penal laws relating to sending minors to immoral places are inapplicable unless the minor is below the age of 18 years. (Penal Code, Sec. 273(f).)

21. One who has reached the age of 18 years may receive a tattoo. (Penal Code, Sec. 653.)

22. Hunting licenses issued to persons under the age of 18 years are governed by special provisions requiring a Certificate of Competency. (Fish and Game Code, Sec. 3032).

23. Minors under the age of 18 years cannot make contracts relating to real property, or any interest therein, or relating to personal property not in the minor's immediate possession or control. (Civil Code, Sec. 33).

24. Persons who have reached the age of 18 years may serve California civil process. (C. C. P. Sec. 410).

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SECTION II

EMPLOYMENT, MARITAL AND MILITARY STATUS AND SCHOOL ENROLLMENT, BY AGE AND SEX FOR UNITED STATES

	17	18	19	20	21
Male					
Population	1,449,801	1,249,225	1,107,977	1,065,814	1,083,261
Working Full-time, %	9.3	25.2	36.8	45.4	52.9
Working Part-time, %	25.6	20.4	15.2	12.9	11.7
Unemployed, %	5.6	7.2	7.6	7.7	7.6
Not in Labor Force, %	56.5	39.3	27.2	20.4	16.6
Enrolled in School, %	76.3	54.6	37.3	27.9	23.6
In Armed Forces, %	3.0	8.9	13.1	13.6	11.2
Married, %	1.9	5.3	12.6	23.6	35.8
Female					
Population	1,415,107	1,243,837	1,162,821	1,119,089	1,114,569
Working Full-time, %	5.9	24.6	33.4	34.6	34.0
Working Part-time, %	16.3	13.4	10.9	9.5	8.4
Unemployed, %	3.7	4.9	5.1	4.8	3.2
Not in Labor Force, %	74.1	56.9	50.3	50.8	52.9
Enrolled in School, %	74.9	46.6	28.4	19.3	13.9
In Armed Forces, %	0.0	0.2	0.3	0.3	0.2
Married, %	11.9	23.8	39.3	52.6	63.5

Reference: 1960 Census

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SECTION III

TITLE III OF VOTING RIGHTS ACT AMENDMENTS OF 1970

Public Law 91-285
91st Congress, H. R. 4249
June 22, 1970

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"Sec. 303. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined

not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"Sec. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

SECTION IV

U.S. CASUALTIES IN SOUTHEAST ASIA BY AGE

Those aged 18 through 20 years have suffered 48.1% of United States casualties in Southeast Asia. (*Lowering the Voting Age to 18,* Hearings Before the Subcommittee on Constitutional Amendments, Committee of the Judiciary, United States Senate, 91st, 2d, p. 69 (Source: Directorate for Information Operations Office of Secretary of Defense, December 16, 1969).)

According to the Department of Defense Statistics cited by Senator Cook, as of December 31, 1969, 19,202 out of the 40,028 (48%) of the men killed in Southeast Asia were 18, 19 or 20 years of age when killed. (Cong. Rec., daily ed., March 11, 1970, 91st, 2d, 3499.)

The percentage of those killed in Southeast Asia under the age of 21 years has increased from 44% at the end of 1968, to 48% at the end of 1969.

[Names of Counsel on Inside of Cover]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 43

STATE OF OREGON, *Plaintiff,*

v.

JOHN N. MITCHELL, Attorney General of the United States, *Defenanda.*

No. 46

UNITED STATES, *Plaintiff,*

v.

STATE OF ARIZONA, *Defendant.*

BRIEF OF YOUTH FRANCHISE COALITION, FIFTY INDIVIDUAL CITIZENS OF THE UNITED STATES OVER 18 YEARS OLD AND UNDER 21 YEARS OLD, AMERICANS FOR DEMOCRATIC ACTION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, [redacted], NATIONAL EDUCATION ASSOCIATION AND INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS, AMICUS CURIAE

These amici curiae file this brief addressed only to the question of the validity of Title III of the Voting Rights Act Amendments of 1970, P. L. 91-285, 91st Congress, 1st Session.

[1]Names, addresses and birth dates of the individual amici are listed in attachment 1. They include at least one individual from each State (and the District of Columbia) in which 18 year old citizens have been denied the vote.

INTEREST OF AMICI

Amici are vitally interested in upholding the validity of Title III. The 50 individual amici are directly and personally interested—it is their right to vote which is at stake. Yough Franchise Coalition was the vehicle by which 13 organizations representing or interested in youth mounted the effort which resulted in the enactment of Title III, and its role was specifically recognized in the Congress. 115 Cong. Rec. H. 763, 764, 766, 767 (February 5, 1969, daily ed.). The Americans for Democratic Action, the National Association for the Advancement of Colored People, the American Civil Liberties Union, the National Education Association, and the International Union, United Automobile Workers, have long favored the concept of 18-year old voting and were active in support of the enactment of Title III. In addition to their dedication to the broadest possible exercise of the electoral franchise, these five organizations are specially interested, at this critical juncture in the nation's development, in bringing our young people into ever-increasing participation in political life. The lowering of the voting age to 18 is a major step towards strengthening democratic processes against the tensions that lie ahead.

JURISDICTION

The original jurisdiction of this Court is invoked under Article III of the Constitution and 28 U.S.C. § 1251(b)(2) and (3).

CONSTITUTIONAL PROVISION

AMENDMENT XIV

Section 1

. . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 5

The Congress shall have power to enforce, by appropriable legislation, the provisions of this article.

STATUTE

P. L. 91-285

Title III–Reducing Voting Age to Eighteen in Federal, State, and Local Elections

Declaration and Findings

Sec. 301.(a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election–

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote–a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteeen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling state interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

Prohibition

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or

in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

Enforcement

Sec. 303.(a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

QUESTION PRESENTED

Does section 5 of the Fourteenth Amendment empower Congress to remedy invidious discrimination against and unjustified unequal treatment of citizens of the United States between 18 and 21 years of age by prohibiting States to deny to such citizens the right to vote?

STATEMENT OF THE CASE

On June 22, 1970, Congress enacted the Voting Rights Act amendments of 1970. Title III of the act prohibits the State to deny the vote to citizens 18 years of age. These cases present the question, *inter alia*, whether title III is

constitutionally valid. Texas and Oregon seek to enjoin the Attorney General from enforcing the Act. The United States seeks to compel Arizona and Idaho to obey the Act. The case is here within this court's original jurisdiction. There is no record.

SUMMARY OF ARGUMENT

I

Congress made findings that denial of the vote to 18 year old citizens was an invidious discrimination and in violation of the equal protection clause. These findings were based on volumimous evidence in hearings and debate. The evidence presented showed that citizens of 18 were now as mature and as capable of exercising the vote intelligently as are citizens of 21; that citizens of 18 have most of the other legal rights and responsibilities of citizens of 21; and that the right to vote was necessary to enable them to prevent discrimination against them in other respects.

II

Section 5 of the Fourteenth Amendment gave Congress the power to enforce equal protection by statute. That grant of power extends to the qualifications of voters and overrides contrary state legislation.

III

Title III is valid under the test of *Katzenbach v. Morgan*, 384 U.S. 641 (1966), that the Court need only perceive a basis for congressional action under Section 5. It also is valid under the test proposed by the dissent in *Morgan*, that such action is valid only if the Congress' findings are based on a record of legislative facts.

IV

Wise constitutional policy supports the Congressional role in enforcement of the Fourteenth Amendment. Such Congressional action eases the burden on the courts.

ARGUMENT

I. LEGISLATIVE HISTORY OF TITLE III OF THE VOTING RIGHTS ACT AMENDMENTS OF 1969

In enacting Title III the Congress made specific findings:

- —that denial of the vote to citizens 18 years old "denies and abridges . . . inherent constitutional rights . . .—a particularly unfair treatment of such citizens . . . ." P. L. 91-285, § 301(a)(1);
- —that denial of the vote to citizens 18 years old denies them "due process and equal protection of the laws . . ." *id.*, § 301(a)(2);
- —that denial of the vote to citizens 18 years old "does not bear a reasonable relationship to any compelling State interest." *id.*, § 301(a)(3);
- —that in order to secure the constitutional rights thus denied, "it is necessary to prohibit the denial of the vote to citizens" 18 years old.

In the following discussion we show the legislative background and history behind these findings.

1. Background: 1942-1970

The proposal to extend the franchise to citizens between the ages of 18 and 21 has a long history in Congress. In 1942, Senator Arthur Vandenberg introduced S. J. Res. 166, a constitutional amendment to lower the voting age to 18. 88 Cong. Rec. 8316 (1942); see "Lowering the Voting Age to 18", *Hearings before the Subcommittee on Constitutional Amendments*, Committee on the Judiciary, United States Senate, on S. J. Res. 8, 14, and 78 (May 14, 15, 16, 1968) (hereafter *Hearings, 1968*) at 79. A similar proposal was

offered in the House at the same time. H.J. Res. 352, 88 Cong. Rec. 8312 (1942) and the House Judiciary Committee held hearings in 1943, "Lowering the Voting Age to 18", *Hearings before the Committee on the Judiciary*, United States House of Representatives, on H.J. Res. 8 (1943). The Senate considered and voted on another such amendment in 1954. S.J. Res. 53, 100 Cong. Rec. 6911 (1954).

Senator Jennings Randolph of West Virginia, then a member of the House of Representatives, introduced a constitutional amendment to lower the voting age in 1942. 88 Cong. Rec. 8507 (1942). In 1969, as a Senator, he offered another, S.J. Res. 147; *see*, statement of Senator Randolph, 116 Cong. Rec. S.2940 (March 4, 1970, daily ed.). Senator Richard Schweiker introduced a similar amendment that same year, S.J. Res. 73, 115 Cong. Rec. S.2511 (March 10, 1969, daily ed.) and *Hearings, 1968* at 84. More than 71 Senators joined Senator Randolph as co-sponsors of his resolution. *See*, 116 Cong. Rec. S.3517 (March 11, 1970, daily ed.).

Congressman Howard of New Jersey introduced a proposed constitutional amendment, H.J. Res. 18, in January 1969. *See*, 115 Cong. Rec. H.763 (February 5, 1969, daily ed.). He reviewed the facts:

–that 18-year-olds marry
–that 18-year-olds are prosecuted as adults in criminal court
–that 18-year-olds make binding contracts
–that 18-year-olds make valid wills
–that 18-year-olds drive cars
–that 18-year-olds own guns
–that 18-year-olds hold jobs
–that 18-year-olds pay taxes
–that 18-year-olds are drafted into the armed forces
–that 18-year-olds "are carrying out our country's policies, but have no voice in choosing those who make those policies." 115 Cong. Rec. H.764 (February 15, 1969, daily ed.).

Other Congressmen echoed Mr. Howard. 115 Cong. Rec. at 765-69. Presidents Dwight Eisenhower in 1954, John F. Kennedy in 1962, Lyndon B. Johnson in 1968, and Richard M. Nixon in 1970, expressed the opinion that a democratic nation could not in good faith continue to deny the vote to citizens between the ages of 18 and 21.[2]

The Senate Subcommittee on Constitutional Amendments (the Bayh Committee) held exhaustive hearings in 1968, *Hearings, 1968*, and 1970. "Lowering the Voting Age to 18", *Hearings before the Subcommittee on Constitutional Amendments, Committee on the Judiciary, United States Senate*, on S.J. Res. 147 and others (February 16, 17, and March 9, 10, 1970) (hereafter *Hearings, 1970*). The hearings focused on the responsibilities assumed by citizens between the ages of 18 and 21, their maturity and education, and the resulting injustice in denying them the franchise.

In 1968, the Bayh Committee heard from 49 witnesses, including 21 Senators, two Congressmen, 12 Governors, and the Vice President of the United States. With few exceptions, they supported extension of the vote to 18- to 21-year-old citizens.

Numerous witnesses referred to familar responsibilities of 18-year-olds–tax liability, treatment as adults for civil and criminal matters, service in the armed forces; to their familiar rights–to marry, to drive cars, to own guns, and to their education and maturity. In view of these legal rights and responsibilities, denial of the vote was, by clear implication, discriminatory. *See*, e.g., statements of Dennis Brinkmeyer, Chairman, State Conference of Committees to Lower Indiana's Voting Age, *Hearings, 1968* at 88; Roy Elson, Administrative Assistant to Senator Carl Hayden, *id.* at 72; Senator Vance Hartke, *id.* at 4; Senator Jacob Javits, *id.* at

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[2]Kennedy: see, *Hearings, 1968* at 80. Eisenhower: *Public Papers of the Presidents 1954, Dwight D. Eisenhower*, 22 (1954); Johnson: *Public Papers of the Presidents 1968, Lyndon B. Johnson*, 669, 751-53 (1968); Nixon: *Hearings, 1970* at 129-130.

12; Donald Lass, Chairman, National and State Committee for the 18-Year-Old Vote, *id.* at 85; Jack McDonald, Chairman, the Young Republican National Federation, *id.* at 43-44; Senator Mike Mansfield, *id.* at 4-6; Spencer Oliver, President, Young Democratic Clubs of America, *id.* at 21; Senator Jennings Randolph, *id.* at 62; Senator Joseph Tydings, *id.* at 9; Senator Ralph Yarborough, *id.* at 68-69; Senator Alan Bible, *id.* at 24; Governor Kenneth Curtis of Maine, *id.* at 101; Senator Peter Dominick, *id.* at 102; Senator Clifford Hansen, *id.* at 26; Senator Mark O. Hatfield, *id.* at 105; Governor Richard Hughes of New Jersey, *id.* at 106; Senator Gale McGee, *id.* at 107; Senator William Proxmire, *id.* at 38; Representative William St. Onge, *id.* at 108; Senator Stuart Symington, *id.* at 110.

Witnesses repeatedly stated that the age of 21 had come to have little relation to the age at which individuals assume the obligations of citizenship and that it was an anachronism to continue the age of 21 as the minimum voting age. Senator Mansfield, for instance, observed that:

> the age of 21 is not simply the automatic chronological door to the sound judgment and wisdom that is needed to exercise the franchise of the ballot, or for that matter, to assume any other responsibility. Indeed, it is the age of 18 that has long been regarded as the age when young people 'try it on their own' and become responsible for themselves and for others. *Hearings, 1968* at 4, 5.

These judgments were supported by statistics.

> As of September 1966, there were 12 million Americans who were 18, 19 or 20 years of age. Of these, 47 percent were degree candidates enrolled in colleges across our Nation; 6 percent of this number were serving in the armed services. The majority, 60 percent, with some overlap in the colleges, were working full-time and 12 percent were unemployed according to the U.S. Department of Labor. Amazing as it may seem, less than 4 percent of these American citizens had the right to vote . . *Hearings, 1968* at 21, statement of R. Spencer Oliver.

It was shown that citizens of 18 are as capable as citizens of 21 to exercise the vote intelligently.

> . . . [A]t no other time are the young so keenly interested and informed on political issues and political candidates. Educational psychologiests have urged that the ability to grasp new ideas reaches its peak at the age of 18, and then it proceeds on a plateau. This, of course, does not mean that wisdom does not increase throughout life—it does. But the capacity to grasp new ideas and developments readily in this so rapidly changing world was never more essential . . . . Without the wisdom of age, government would be chaotic and without the vision of youth, government would be stagnant. Not as a gesture but as a right, I urge the passage of Senate Joint Resolution 8. *Hearings, 1968* at 38, 39, statement of Senator William Proxmire.

The experience of the states that had lowered the voting age showed that no harm resulted. In the words of the Mayor of Fairbanks, Alaska, "18-year-old voting in the State of Alaska is something that we are proud of." Statements of Henry A. Boucher, Mayor, Fairbanks, Alaska; Edward A. Mendes, City Attorney; Harry J. Porter, Councilman; and Conrad Frank, Engineer, *Hearings, 1968* at 52-59. See also Statements of Senator Birch Bayh, *id.* at 3; R. Spencer Oliver, *id.* at 20, 22; Senator Howard Cannon, *id.* at 40; Jack McDonald, *id.* at 44; Paul McMillan, *id.* at 81.

Again in the 1970 hearings many witnesses testified to the legal rights and legal obligations of citizens of 18, which make denial of the vote an unjustified discrimination. *See*, e.g., statements of Senator Jennings Randolph, *Hearings, 1970* at 5; Theodore E. Sorenson, *id.* at 15-16; Dr. Walter Menninger, *id.* at 22; Dr. S. I. Hayakawa, *id.* at 36; Deputy Attorney General Richard Kleindienst, *id*, at 78-79; John Lumley, National Education Association, *id.* at 93; former Attorney General Ramsey Clark, *id.* at 102-103; Private Gerald Springer, *id.* at 111; Representative Allard K. Lowenstein, *id.* at 114-115; Carl J. Megel, Director of Legislation,

American Federation of Teachers, *id.* at 125-126; Senator Barry Goldwater, *id.* at 131-134; Philomena Queen, National Association for the Advancement of Colored People, *id.* at 152-153; Senator Edward M. Kennedy, *id.* at 156-158; Dr. Margaret Mead, *id.* at 223.

Witnesses repeatedly referred to the icnreased maturity and educational attainments of 18-year-old citizens in comparison with earlier times. Only 15 percent of the nation's 18-year-olds had a high school diploma in 1940; in 1969, the figure was approximately 80 percent. Senator Marlow Cook, *Hearings, 1970* at 128. Senator Hruska quoted President Nixon:

> The younger generation today is better educated, it knows more about politics, more about the world than many of the older people. This is why I want them to vote, not because they are old enough to fight but because they are smart enough to vote. *Hearings, 1970* at 83.

Deputy Attorney General Kleindienst stated:

> America's 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplify the highest qualities of mature citizenship. *Hearings, 1970* at 78.

Margaret Mead, the famed anthropologist, testified "that in the last 100 years the age of physical maturity has been dropping over three years." *Hearings, 1970* at 223.

Many witnesses testified that grant of the vote was necessary to remedy discrimination against the nation's youth. *See*, e.g., statements of Senator Goldwater, *Hearings, 1970* at 133; Senator Kennedy, *id.* at 157; and comments by Senator Cook, *id.* at 245, 246. Ramsey Clark's statement was typical:

> Elemental fairness dictates inclusion of eighteen year olds and above in the system . . . . Sixty per cent within the age group find some employment. Their income is taxed at the same rates as their grandfathers with the same income. The young have no wealth unless it was given to them. College or trade school is expensive. So are food and clothing, an old apartment, a car, and babies . . . . We permit them to marry, and over one million have . . . . We hold them responsible for crime if they were adults and some now wait on death row to see whether this Nation still takes human life in the name of justice. We emancipate them to contract and hold them liable for their debts. We trust them to drive automobiles that kill tens of thousands annually and hold them liable for their negligence, and to own and possess guns which vastly increase the climate of violence of America . . . . Twenty-nine per cent of our war dead are under 21 years of age. Twelve thousand young men sent into deadly combat gave their lives but were never permitted to participate in the only democratic process by which we determine whether any shall go . . . . Can we deny that young people in our society reaching 18 years of age today have been subjected to more interpersonal relationships, experienced a greater and more difficult range of social pressures, been more alone in making more critical personal decisions, been drilled more relentlessly in educational processes and received more communications through mass population and advanced technology than the average American in a lifetime heretofore?
>
> These young men and women are the best educated generation to date . . . . [A] constant bombardment of TV, radio, newspapers, magazines and books make our young the most informed people in history and experienced beyond their age group in any other time. *Hearings, 1970* at 102-103.

Once again the experience of the four states that have lowered the voting age was relied upon. Deputy Attorney General Kleindienst said:

> The experiences of the four states which have voting age requirements lower than 21 make it clear that such a course may now be taken for the nation at large. Georgia in 1943 was the first state to permit 18-year-olds to vote; Kentucky followed in 1955. Alaska and Hawaii, upon their admission to the union, permitted 19 and 20-year-olds, respectively, to vote. Officials of these states agree that their experience with young voters has been constructive and positive. To my knowledge none of these states has any regrets about its policy; none has advocated that the minimum voting age be raised to age 21. *Hearings, 1970* at 79.

See also statement of Theodore Sorenson, *id.* at 17.

2. The Voting Rights Act Amendments–Title III

The matter of grant of the right to vote to 18 to 21 year old citizens by statute was broached by Senator Edward M. Kennedy at hearings before the Senate Subcommittee on Constitutional Rights on February 24, 1970. "Amendments to the Voting Rights Act of 1965", *Hearings before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate*, on S.818, 2456, 2507 and Title IV of S.2029 (July 9, 10, 11 and 30, 1969, February 18, 19, 24, 25 and 26, 1970) at 322-30 (cited as *Voting Rights Hearings*). At the hearings, Senator Kennedy submitted an exhaustive memorandum on lowering the voting age to 18.

The memorandum argued that the higher educational achievement of today's youth, together with their deep involvement in public issues and their increased service to the nation through agencies such as the Peace Corps and VISTA, made 18- to 21-year-olds much more mature than previous generations and equipped to accept the responsibility of the vote. Lowering the voting age would "encourage civil responsibility" and "promote greater social involvement and political participation for our youth." *Voting Rights Hearings* at 323. On the other hand, denial of the vote at

18 made citizens uninterested in government. The memorandum referred to the 1963 report of President John F. Kennedy's Commission on Registration and Voting Participation:

> '[B]y the time they have turned 21 . . . many young people are so far removed from the stimulation of the educational process that their interest in public affairs has waned. Some may be lost as voters for the rest of their lives.' *Ibid.*

Moreover, "in many important respects and for many years, we have conferred far-reaching rights on our youth, comparable in substance and responsibility to the right to vote." *Ibid.* As examples, the 18-year-old can marry, pay taxes, be drafted into the armed forces, own a gun, and be criminally responsible for his conduct. Experience with voting by persons under 21—in Georgia, Kentucky, Alaska and Hawaii—"justifies its extension to the entire Nation." *Id.* at 324.

Therefore, the memorandum argued:

> Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the Nation's youth in the public services they receive. By reducing the voting age to 18, we can enable young Americans to improve their social and political circumstances . . . . The many discriminations worked against millions of young Americans are . . . real . . . . We know, for example, that increasing numbers of Federal and State programs, especially in areas like education and manpower, are directed toward our youth. We can no longer discriminate against them by denying them a voice in the political process that shapes these programs. *Id.* at 327.

Hence, "Congress could reasonably find that the disenfranchisement of 18- to 21-year-olds constitutes on its face the sort of unfair treatment that outweighs any legitimate state interest in maintaining a higher age limit . . . ." *Ibid.*

3. Introduction of Title III: The Debates

On March 4, 1970, Senator Mansfield, with the co-sponsorship of eight other Senators, offered Amendment No. 545, to add a new Title III to the Voting Rights Act, granting the right to vote in Federal, state and local elections to citizens 18 years old. 116 Cong. Rec. S.2938 (March 4, 1970). Senator Mansfield relied on the Kennedy Memorandum as "an excellent factual basis upon which the Senate should proceed to give the franchise to our younger citizens" and "ample foundation" for the amendment. 116 Cong. Rec. S.3392 (March 10, 1970).

The amendment was exhaustively debated in the Senate and House. *See* 116 Cong. Rec. S.2938-40, 2968, 3001-02 (March 4, 1970);[3] S.3057-65, 3088 (March 5, 1970); S.3185-86, 3197 (March 6, 1970); S.3214-20, 3261 (March 9, 1970); S.3391-96, 3405, 3411-19 (March 10, 1970); S. 3474-3525, 3544-48, 3552-57 (March 11, 1970); S.3572-78, 3581-86 (March 12, 1970); S.3724-25 (March 13, 1970); H. 3977-84 (May 6, 1970); S.7277-85 (May 18, 1970); H.5639-79 (June 17, 1970). In the debates there was virtually no opposition to the 18-year-old vote on its merits. *Cf.* Senator Spessard Holland, 116 Cong. Rec. S.3186 (March 6, 1970). The day before the vote in the Senate, Senator Mansfield observed that "so far as I am aware, not a Member of this body, to my knowledge, has spoken during this floor debate against extending the voting franchise to those 18 and above." 116 Cong. Rec. S.3501 (March 11, 1970). The controversy centered around whether the vote should be granted by statute or by constitutional amendment. See part 4, *infra*.

Much of the Senate and House debate on the Mansfield Amendment delved into the role of youth in the nation's political and socio-economic structures and the denial of the vote as discrimination. The *Record* is replete with data con-

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[3]All 1970 references are to the daily edition of the Congressional Record.

cerning the responsibilities of youth. Senator Cook pointed out, for example, that almost 30 percent of the 3.5 million men in the armed forces are under 21, and that approximately 50 percent of those who died in Vietnam were under 21. 116 Cong. Rec. S.3214 (March 9, 1970). Senator Cook introduced into the Record the statement of Senator Goldwater submitted to the Bayh Committee Hearings. Senator Goldwater's position doubtless persuaded many conservative Members of Congress that denial of the vote to 18-year-olds is discriminatory. He said:

> . . . [T]here are . . . impressive arguments which demonstrate that eighteen-year-olds have reached maturity. Insurance companies hold a person to be an adult when he is eighteen. Eighteen-year-olds are treated as adult by penal codes. Eighteen-year-olds are allowed to obtain unrestricted automobile operator's licenses in every State. Young Americans can enter the Federal Civil Service at 18, be taxed at 18, and marry in any State at 18. Indeed, almost 50% of girls between 18 and 21 are married . . . . And yet they are not allowed to vote . . . . [T]his attitude is outmoded and archaic. It is literally based on a tradition which dates back to medieval times.
>
> Perhaps, in the days around the turn of the century, it once had meaning. In 1900 only 6% of Americans who had reached 18 were high school graduates. In fact, as late as 1940, only one-half of all 18-year-olds had completed high school.
>
> But this is 1970. This is the age of instant communications, all-news radio stations, T.V. news, and the most avid political concern on the part of young Americans that I have ever witnessed.
>
> Today fully 81% of Americans have graduated from high school before they reach 18. Almost 50% of 18-, 19- and 20-year-olds are enrolled in college. And the education which they are receiving is more advanced and intense than in any time in our history.
>
> In short, youth today is better informed and better equipped than any previous generation. They are

> without a doubt equally mature, both mentally and physically, as the average citizen who had reached 25 when I was growing up. In fact, they may be better able to comprehend the dramatic technological advances and changing perspectives of modern life than many of their parents.
>
> Therefore, I hold that there is no sensible reason for denying the vote to 18-year-olds. What's more, I think we have studied the issue long enough. The voting age should be lowered and lowered at once across the entire nation. 116 Cong. Rec. S.3216 (March 9, 1970).

Senator Goldwater's statement presents, in summary form, the evidence before Congress demonstrating that denial of the vote at age 18 is discrimination in violation of the equal protection clause: that at 18 they incur myriad legal responsibilities of citizenship; they acquire myriad legal rights of citizenship; and by maturity and education they are as qualified to vote as are persons 21 years of age. This evidence was referred to by Senator after Senator and Congressman after Congressman in the debates cited on p. 14, *supra.*

Thus persuaded, many Senators and Representatives explicitly stated that by lowering the voting age Congress could remedy unfair discrimination against the nation's youth. *See*, e.g., statements of Senator Warren Magnuson, 116 Cong. Rec. S.2939 (March 4, 1970); Senator Frank Moss, 116 Cong. Rec. S.3088 (March 5, 1970); Senator Marlow Cook, 116 Cong. Rec. S.3214 (March 9, 1970); Senator Edward Kennedy, 116 Cong. Rec. S.3478 (March 11, 1970); Senator Fred Harris, *id.* at S.3493; Senator Ralph Yarborough, *id.* at S.3496; Senator Gale McGee, *id.* at S.3496; Senator Vance Hartke, *id.* at S.3497; Senator Joseph Tydings, *id.* at S.3497-98; Senator Howard Cannon, *id.* at S.3499; Senator Stephen Young, *id.* at S.3499-3500; Senator Alan Bible, *id.* at S.3500-01; Senator William Fulbright, *id.* at S. 3506; Senator Birch Bayh, *id.* at S.3510; Senator Mike Mansfield, 116 Cong. Rec. S.3577 (March 12, 1970); Senator Walter Mondale, *id.* at S.3584; Senator Joseph Montoya, *id.* at S.3583; Representative William McCulloch, 116 Cong. Rec.

H.5643 (June 17, 1970); Representative Spark Matsuaga, *id.* at H.5639-40; Representative John Anderson, *id.* at H. 5643-44; Representative Abner Mikva, *id.* at H.5644; Representative Robert McClory, *id.* at H.5645; Representative Carl Albert, *id.* at H.5645; Representative Paul McCloskey, Jr., *id.* at H.5654; Representative Richard Ottinger, *id.* at H.5656; Representative Donald Edwards, *id. at* H.5660; Representative Bertram Podell, *id.* at H.5656, 5659; Representative Peter Rodino, *id.* at 5657; Representative Louis Stokes, *id.* at H.5661; Representative Melvin Price, *id.* at 5664; Representative John Tunney, *id.*, at H. 5667; Representative Howard Robinson, *id.* at H. 5671-72; Representative Charles Vanik. *id.* at H.5670; Representative John McCormack, *id.* at H.5675.

Senator Moss of Utah, for example, noted that a careful analysis of political conditions warranted the conclusion that persons between the ages of 18 and 21 had, in fact, been subject to discrimination. He then stated, "I believe that this discrimination against 18- to 21-year-olds is invidious and that Congress should so find." 116 Cong. Rec. S. 3088 (March 5, 1970). Senators Cook and Kennedy frequently referred to the discrimination issue during the debates. 116 Cong. Rec. S.3214 (March 9, 1970); 116 Cong. Rec. S.3478 (March 11, 1970); 116 Cong. Rec. S.3576 (March 12, 1970). Senator Yarborough of Texas observed that "we are demanding of young men and women from the age of 18 to 21 all the duties of citizenship, yet we deny them the most basic right—the right to vote." 116 Cong. Rec. S.3496 (March 11, 1970). Senator Mansfield commented that "the youngsters of today are being discriminated against just as women were until a few decades ago, just as the slaves were until a century ago." 116 Cong. Rec. S.3577 (March 12, 1970). Senator Montoya of New Mexico added, "I shall support that amendment (No. 545), and any other effort to rectify what I consider one of the great wrongs of our society." 116 Cong. Rec. S.3583 (March 12, 1970).

Congressmen such as Robert McClory of Illinois and Sherman Lloyd of Utah expressed the opinion that this legislation

could well mitigate, if not eliminate, the discrimination which had been practiced against youth. 116 Cong. Rec. H. 5645, 5665 (June 17, 1970). Many other Congressmen referred to the responsibilities conferred on youth and stated that it was unfair to expect youth to perform obligations of citizenship without allowing them the corollary rights of citizenship.

Representative Paul McCloskey, Jr. of California declared:

> If equal protection of the laws is to have any real meaning at this point in our history, it would seem reasonable to conclude that the obligation to fight and die in a war against people whom a man does not hate, in a cause in which he does not believe, justifies the protection of law that such a man and the loved ones of his age be entitled to vote for or against such cause. 116 Cong. Rec. H.5654 (June 17, 1970).

Congress was made particularly aware of the experience of the states that had lowered the voting age. This experience had shown nothing but benefits and none of the harms to the electoral process feared from immaturity. As Senator Cook stated:

> We have had the benefit of 14 years experience with responsible voter participation by this block. Contrary to the allegations of many of my conservative friends, there has not been any discernable pattern of voting behavior. In fact, it could be strongly contended that the growth of the Republican Party in Kentucky, generally considered to be the more conservative of the two parties, has directly paralleled the enfranchisement and increase in participation of this age group.
>
> Every major statewide candidate in recent memory has had a fulltime youth chairman whose sole function it was to seek out and secure the support of this block of roughly 100,000 potential voters. For those who attend a college in Kentucky, politics is a way of life. Some argue we should keep politics off the

> campuses. I agree to the extent that that means political interference by State officials or even Federal officials with academic and political freedom of thought and expression. I most emphatically do not agree if it means college people should not be allowed to vote and in a meaningful way support the candidates of their choice.
>
> Politics on the campus in Kentucky means that for a candidate to be credible he must appear and subject himself to the intelligence and insight of today's politically sagacious youth. Our bright young Kentuckians are a great force against the hypocritical handshaking, backslapping, baby kissers of the old school of politics. In fact, it could be argued very persuasively that their participation has significantly up-graded both the caliber and the campaigns of the Kentucky politician of today.
>
> In summary, the Kentucky experience has been a complete success, and I would venture a wager that one could not find 1 percent of Kentuckians, whether liberal or conservative, mountaineer or farmer, city dweller or tobacco grower, who would advocate raising the age. 116 Cong. Rec. S.3215 (March 9, 1970).

See also statements of Senator Cook, 116 Cong. Rec. S. 5657 (June 17, 1970), Representative Bill Burlison, *id.* at H.5668-69, and Representative Ken Hechler, *id.* at H.5647.

Finally, near the close of the debate, Speaker of the House John McCormack stepped down from his chair and made an unusual speech on the floor of the House. He implored his colleagues to support Title III: "We are not conferring citizenship, because they are citizens once they are born. The question is the assumption of the fullness of citizenship, to wit, the vote." 116 Cong. Rec. H.5675 (June 17, 1970).

Both Houses of Congress adopted Title III by overwhelming vote: the Senate by 64-17, 116 Cong. Rec. S.3585 (March 12, 1970), and the House by 272-132, 116 Cong. Rec. H.5679 (June 17, 1970).

4. The Question of Constitutionality

The constitutionality of Title III under the implementing clause of the 14th Amendment was given a great deal of consideration in the debates. Congress was aware of the legal issues involved, and was conscious of the arguments against its constitutional authority. Congress focused explicitly on whether Section 5 of the 14th Amendment was a sufficient grant of power to limit the power of the states to determine voting qualifications. Having fully considered these legal issues, Congress believed that its authority under the Constitution extended to the power to lower the voting age by statute.

Senator Ervin, a respected authority in the Senate on constitutional law, had argued that legislation to lower the voting age was inconsistent with the power delegated to the Congress by the Constitution. 116 Cong. Rec. S.2940, 3001-02 (March 4, 1970); S.3477 (March 11, 1970). Senator Ervin relied on four provisions of the Constitution: Article I, section 2; Article II, section 1; and the Tenth and Seventeenth Amendments.

Other authorities, like Congressman Celler, Chairman of the House Judiciary Committee, referred to these provisions as well. 116 Cong. Rec. H.2737 (April 27, 1970). Congressman Celler had reservations about the constitutionality of Title III, but nevertheless supported enactment.

President Nixon, in a letter to Speaker McCormack, referred to section 2 of the Fourteenth Amendment as authority for the age of 21 as refuting Congress' power to lower the voting age. H. R. Doc. No. 91-326 (91st Cong., 1st Sess.).

Most of the controversy centered on the conflicting opinions of legal scholars. The most prominent opponent of the statute was Louis Pollak, then dean of the Yale Law School. 116 Cong. Rec. S.3494 (March 11, 1970). Dean Pollak's arguments were cited frequently in the debates. Representative Clark MacGregor of Minnesota inserted in

the *Record* letters from eleven lawyers and law professors, expressing an opinion that Title III was unconstitutional. 116 Cong. Rec. H.5647-53 (June 17, 1970).

Proponents of Title III also relied on the opinions of scholars. *See*, e.g., letters from 18 lawyers and law professors addressed to and inserted in the *Record* by Senator Kennedy, 116 Cong. Rec. S.7277-7285 (May 18, 1970). The most prominent were professors Archibald Cox and Paul Freund of the Harvard Law School. Professor Cox argued that Congress has ample power under section 5 of the Fourteenth Amendment to lower the voting age, and that any reasonable finding by Congress in this matter was a sufficient basis to uphold its constitutionality under the reasoning of *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *Voting Rights Hearings* at 330; also 116 Cong. Rec. S.3062-3063 (March 5, 1970) and *id.* at S.3481 (March 11, 1970). Professor Cox's opinion was referred to frequently in both the Senate and House debates. *See*, e.g., statements of Senator Magnuson, 116 Cong. Rec. S.2939 (March 4, 1970); Senator Cook, 116 Cong. Rec. S.3215 (March 9, 1970); Senator Kennedy, 116 Cong. Rec. S.3478 (March 11, 1970); Senator Harris, *id.* at S.3493; Senator Fulbright, *id.* at S.3506; Senator Bayh, *id.* at S.3509; Representative Matsunaga, 116 Cong. Rec. H. 5640 (June 17, 1970); Representative McCulloch, *id.* at H. 5643; Representative Carl Albert, *id.* at H.5645; Representative Podell, *id.* at H.5659; Representative McCormack, *id.* at H.5675.

Professor Cox's view was supported by Professor Freund, 116 Cong. Rec. S.3060-62 (March 5, 1970). In response to a telegram from Senator Mansfield, Professor Freund outlined in greater detail the power of Congress to extend the franchise to 18-year-olds. 116 Cong. Rec. S.3502-03 (March 11, 1970). In particular, Professor Freund referred to the Supreme Court's decision in *Harper v. Virginia Board of Elections*, 388 U.S. 663 (1966), where, Professor Freund commented, even the dissenting justices agreed that any legislation designed to remedy discrimination violative of the

Equal Protection Clause was appropriate legislation under section 5.

In the final analysis, the persuasiveness of the proponents' legal arguments is suggested by Senator William Fulbright's statement shortly before the Senate vote on Title III:

> I have long favored lowering the voting age to 18, . . . I have, nevertheless, listened to the questions raised about whether it would be constitutionally correct for the Congress to enact a statute to this effect in view of the constitutionally based premise that voter qualifications shall be set by the several states. However, as this issue has been developing in the Senate, and especially with regard to the new amendment just offered,[4] I have been most impressed with the arguments made by such eminent legal authorities as Professors Freund and Cox, not to mention those made by the distinguished majority leader and the assistant majority leader. The reasoning supporting the amendment has been most eloquently expressed in the Chamber today and I need not elaborate upon it at this time. I am persuaded by these arguments and, accordingly, I shall vote for this amendment [No. 545]. 116 Cong. Rec. S.3506 (March 11, 1970).

To conclude—the findings the Congress made in § 301(a) of the Voting Rights Act Amendment are supported by a legislative record as full as that of any act of Congress declaring fundamental rights.

II. THE GOVERNING LEGAL PRINCIPLES

1. The Fourteenth Amendment forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." State power to prescribe voting qualifi-

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[4]The amendment was one offered by Senator Allen, adding to section 302 of Title III, "Except as required by the Constitution, . . ." 116 Cong. Rec. S. 3503 (March 11, 1970).

cations is limited by the equal protection clause; states may not constitutionally prescribe qualifications that are "not germane to one's ability to participate intelligently in the electoral process." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965).

2. The standards of equal protection are not static, but move with the times. ". . . the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for the purposes of the equal protection clause *do* change." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966) (emphasis in original). Thus a classification that might have been lawful in 1870 may be unlawful in the changed circumstances of 1970.

3. Voting rights are fundamentally important; the right to vote is basic to participation in the political process, on which many other rights depend. It is the right that is "preservative of all rights." *Yick Wo. v. Hopkins*, 118 U.S. 356, 370 (1886). State voting classifications are therefore to be closely scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). States may exclude persons from voting only "to promote a compelling state interest." *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). This is a stricter standard than that applied to other state legislation. *Kramer v. Union Free School District, supra*, 395 U.S. at 627-28.

4. Section 5 of the Fourteenth Amendment provides that "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article." This implementing section is virtually identical to section 2 of the Thirteenth Amendment and section 2 of the Fifteenth Amendment. By these sections "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in" the Amendments. *South Carolina v. Katzenbach*, 383 U.S.

301, 326 (1966) (referring to section 2 of the Fifteenth Amendment).

These sections were, then, a grant to Congress of new legislative power to intervene in matters theretofore confided exclusively to the states. "It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibition by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). Moreover, wide latitude was granted to Congress to define violations of equal protection. "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view . . . is brought within the domain of Congressional power." *Ex Parte Virginia*, *supra*, 100 U.S. at 346. And "the extent to which Congress shall exercise this power must depend on its discretion in view of the circumstances of each case." *United States v. Hall*, 26 Fed. Cas. 79 (No. 15, 282) (C.C.S.D. Ala. 1871). "[A] majority of the members of [the Framing Congresses] believed that the equal protection clause . . . vested Congress at the very least with primary power to set aside unequal State laws . . . ." Harris, *The Quest for Equality* 53 (1960).

5. National legislation implementing the equal protection clause pursuant to this grant of power prevails even though it "may interfere with the full exercise and enjoyment of rights [a state] would have had if those powers had not thus been granted." *Ex Parte Virginia, supra*, 100 U.S. at 346-47. This principle applies to State legislation respecting voting, which may not conflict "with Congressional legislation enacted in the exercise of those powers [delegated to the National Government]." *Parker v. Brown*, 317 U.S. 341, 359-60 (1943), cited in *Smith v. Allwright*, 321 U.S. 656, 657 (1944).

III. *KATZENBACH v. MORGAN*

These principles were applied by the Supreme Court in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), to decide the constitutionality of section 4(e) of the Voting Rights Act of 1965. In section 4(e) Congress declared it "necessary" to:

> secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English . . . to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

Section 4(e) goes on to provide that states may not deny the vote on the ground of illiteracy in English to any person who shows that he has successfully completed the sixth grade in a primary school accredited by the states or the Commonwealth of Puerto Rico in which the language of instruction was other than English.

1. In *Morgan* the Supreme Court upheld this enactment by a 7-2 majority as "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment . . . ." 384 U.S. at 646. The Court specifically rejected a contention that the power of Congress to act under section 5 was conditioned upon an independent determination of the judicial branch "that the enforcement of the state law precluded by Congress violated the Amendments . . . ." 384 U.S. at 648. Such an analysis, the Court asserted,

> would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of § 1 of the Amendment. 384 U.S. at 648-49.

The critical question in *Morgan*, therefore, was not whether the Court was itself prepared to strike down English literacy

tests as constitutionally invalid. It was whether section 4(e) was, within the meaning of section 5 of the Fourteenth Amendment, "appropriate legislation to enforce the Equal Protection Clause". 384 U.S. at 650. Looking to the decisions that followed enactment of the Amendment, *Ex Parte Virginia*, 100 U.S. 339 (1880), *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Virginia v. Rives*, 100 U.S. 313 (1880), the Court found that the criteria applied to decide this question were three: whether the statute was intended to enforce the guarantees of the Fourteenth Amendment; whether it was "plainly adapted" to that end; and whether it was consistent with other provisions of the Constitution. 384 U.S. at 650-51. The post-Civil War Court had derived these criteria from Chief Justice Marshall's construction of the necessary and proper clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1820):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. 384 U.S. at 650-51.

The only one of the three criteria that the Court analyzed at length in *Morgan* was the "plainly adapted" test. The proper approach to this test, in the Court's view, was for it to ask whether it could "perceive a basis upon which Congress might predicate a judgment" that a prohibition of English literacy tests would further the aims of the Equal Protection Clause. It was able to perceive two such bases: (a) the "enhanced political power [afforded by section 4 (3)] will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community . . . . It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal instrusion upon any state interests served by the English literacy requirement." 384 U.S. at 652-653; (b) on the other hand, section 4(e) may have been "merely legislation aimed at the elimination of an invidious discrimina-

tion in establishing voter qualifications." 384 U.S. at 653-54. On either hypothesis, section 4(e) had a rational basis and therefore was "plainly adapted" to furthering the aims of the equal protection clause.

2. Title III of the Voting Rights Act Amendments of 1970, reducing the voting age to eighteen in federal, state and local elections, is valid under the principles set forth by the Court in *Morgan*. Like Section 4(e) of the 1965 Voting Rights Act, Title III is "predicated" on an express congressional "judgment" that it is necessary, in order to protect Fourteenth Amendment rights, to enact a federal statute superseding and prohibiting certain state laws governing voting qualifications. As in *Morgan*, a court could perceive reasonable bases for Title III *either* in the desire of Congress to enhance the political power of persons of age 18 to 21 in order that such persons may gain nondiscriminatory treatment by government *or* in a congressional desire to cure an irrational discrimination in the right to vote itself. And like section 4(e), Title III is perfectly consistent "with the letter and spirit of the Constitution,"[5] for like section 4(e) it extends the franchise to persons who otherwise would be denied it by state law. 384 U.S. at 657.

[5]It has been suggested that Title III may be inconsistent with section 2 of the Fourteenth Amendment, which imposes a penalty of loss of congressional representation on states that deny the vote to persons "being twenty-one years of age." The argument is apparently that this section assumes that state laws may validly limit the vote the persons of age 21 or older. But section 2 is a very specific provision for a certain remedy for a particular evil. There is no reason to believe that the assumption made by the section is anything more than a reflection of the age test for voting that prevailed generally when the Fourteenth Amendment was proposed to the states for ratification. *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669, p. 26, *supra*, demonstrates that the content of equal protection may change and that a classification valid at one point in time may not withstand scrutiny at another. In these circumstances, it is hard to see why Title III violates the "letter" of section 2. And since Title III of the 1970 Voting Rights Act is aimed like section 2 at protection of the franchise, it is even harder to see how the "spirit" of the section is violated by the statute.

3. Title III is also valid within the criteria argued for by the dissent in *Morgan*. The dissenting opinion, written by Mr. Justice Harlan with Mr. Justice Stewart concurring, argued that leaving aside section 4(e), state English literacy tests had to be considered "reasonably designed to serve a legitimate state interest". Such tests were therefore valid under the equal protection clause. 384 U.S. at 661. The dissent recognized that in *Morgan* "the pivotal question . . . is what effect the added factor of a congressional enactment has on the straight equal protection argument . . . ." 384 U.S. at 665, but disputed the majority's holding that "the test for judicial review of any congressional determination in this area", *id.* at 666, was whether the court could "perceive a basis" for the Congressional enactment. The test instead should be whether there had been an "infringement" of the Equal Protection Clause, and this "question is one for the judicial branch ultimately to determine." *Id.* at 667.

In making that determination, however, the dissent continued, the Court could not find the "legislative judgment" incorporated in the statute to be "without any force whatsoever." It was entitled to respect based upon what was in the record the Congress had made:

> Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. 384 U.S. at 668.

In three recent cases, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); and *Katzenbach v. McClung*, 379 U.S. 294 (1964) the dissent noted, there had been legislative findings adequate to support congressional enactments pursuant to the Fifteenth Amendment and the commerce power, and the Court had deferred to such findings.

For section 4(e), however, there was "simply no legislative record supporting such hypothesized discrimination [suggested by the majority] of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns." 384 U.S. at 669. In the dissenters' view the congressional declaration on which section 4(e) was based, that it is "necessary" for the protection of constitutional rights to abolish state English literacy laws, was nothing more than "a legislative announcement" which was "unsupported by a legislative record" and hence "mere *ipse dixit*." 384 U.S. at 669, 679-71.

The dissenters recognized the "presumption of validity" to which all Acts of Congress, including section 4(e), are entitled. 384 U.S. at 670. But, they argued, the presumption alone was insufficient to overcome the "similar presumption" give to state statutes:

> At least in the area of primary state concern a state statute that passes constitutional muster under the judicial standard of rationality should not be permitted to be set at naught by a mere contrary congressional pronouncement unsupported by a legislative record justifying that conclusion.[6] 384 U.S. at 670-71.

The *Morgan* dissent recognizes that legislative facts compiled by the Congress in support of an enactment under the Fourteenth Amendment are "of course entitled to due respect" by the Court. 384 U.S. at 668. More significantly,

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[6] Justice Harlan's test for State legislation, that it not be "arbitrary or irrational", is no longer applicable in connection with state classifications fencing certain citizens out of the franchise. The test is now (see part II 3, *supra*) "whether the exclusions are necessary to promote a compelling state interest", *Kramer v. Union Free School District*, 395 U.S. 621, 627, 628 (1969). Whether the higher standard state enactments must now meet lowers the burden on Congress to marshal facts in order to support contrary legislation under section 5 of the Fourteenth Amendment, perhaps like a see-saw, is a refinement we need not pursue.

the dissent admits that the conclusion reached by Congress on the basis of such facts must be given "deference" and that the "congressional estimate . . . bearing upon the validity *vel non* of a statute", 384 U.S. at 669, gains in stature to the extent that a court is satisfied of the adequacy of the supporting record and the rationality of the specific conclusions reached on the basis of that record. If Congress has compiled a comprehensive record and drawn rational conclusions from the facts before it, the judiciary must defer to such conclusions. Thus the difference between majority and dissent in *Morgan* boils down to this: the dissent would require Congress to *have demonstrated*, while for the majority it is enough for the courts to *perceive*, a rational basis for congressional enactments.[7]

The dissent's approach would seem to be the same approach adopted by the Court earlier in *Katzenbach v. McClung*, 379 U.S. 294, 303-304, to test Congress' authority to reach discrimination by legislation under the commerce clause.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have

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[7]On this analysis, there should be no special reason to fear the danger suggested in Justice Harlan's dissent of Congress "enacting statutes so as in effect to dilute equal protection and due process decisions of this Court." 384 U.S. at 668. First, it is for the courts to define the zone of reasonableness within which Congress may act. Second, the situation posited by Justice Harlan will be rare: Since Congress may act under section 5 of the Fourteenth Amendment only to enforce other provisions of the Amendment, a conflict with the judiciary will only arise when Congress claims that a particular classification is invalid. See *Developments in the Law–Equal Protection*, 80 Harv. L. Rev. 1065, 1075-76 (1969). Finally, the danger perceived by Justice Harlan is not limited to the area of the Fourteenth Amendment. The possibility of a similar problem arising under the commerce clause or the necessary and proper clause did not prevent the Supreme Court from deciding, e.g., *Katzenbach v. McClung, supra*.

> a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

The *McClung* approach accords with Justice Harlan's view that "it is a judicial question whether the condition with with Congress has . . . sought to deal is in truth an infringement of the Constitution . . . ." 384 U.S. at 666. It would only mean that in deciding that judicial question the courts must accept congressionally determined facts and defer to the presumption of validity that is given to a rational congressional conclusion based on such facts.[8]

5. There is ample basis in the legislative history of Title III of the Voting Rights Act Amendments of 1970 to satisfy the test of *McClung* and of the dissenters in *Morgan*. In part I, *supra*, we have set forth the exhaustive legislative record supporting the Congress' findings.

In that legislative record Congress had before it evidence that the requirement constitutes *invidious discrimination*

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[8]In this connection, the Supreme Court in *Morgan* could not avoid the choice between deferring to state legislatures and deferring to Congress, since a rational argument could be mustered either to support state English literacy tests or to find them objectionable. Alfange, Congressional Power and Constitutional Limitations, 18 J. Pub. L. 103, 126-27 (1969). As Alfange points out:

> [W]hile there is every reason why the Court should normally defer to a reasonable judgment of a state legislature, it is not clear why Congress must grant such deference also. The underlying basis for the judicial deference is that courts are not legislatures and must, therefore, allow legislative bodies wide scope for the establishment of public policy. Congress, however, is a legislature. It has been delegated unequivocal constitutional authority to enforce the demands of the fourteenth amendment. Surely in exercising this authority, it must have some freedom to decide what is a violation of that amendment and need not bow, as courts do, to every arguably rational conclusion of state legislatures.

Although Alfange makes the point in support of the Morgan majority, it would apply with even greater force if a court's standard of review allowed it to assure itself of the legislative process leading to "establishment of public policy."

because: (a) most important rights and obligations of citizenship devolve upon American citizens at age 18, not age 21; (b) today's citizens of age 18 to 21 are far more mature, educated, and politically interested than citizens of that age group have been in the past; (c) there is reason to believe that this increasing maturity and awareness of citizens of age 18 to 21 will continue in the future, given educational opportunities in the United States and the influence of our communications media; (d) there is no sound reason or compelling state interest, in light of the above factors, to discriminate between citizens of age 18 to 21 and citizens of age 21 and older; (e) the experience of those states that have taken the initiative to lower the voting age has produced no negative effects and disclosed no reason why the voting age should not be lowered throughout the country.

Further, Congress had before it facts showing that the *enhanced political power* that will be gained by citizens of age 18 to 21 if they are granted the right to vote will enable them to achieve nondiscriminatory treatment with respect to the numerous laws and programs that affect them directly: laws relating, for example, to the criminal responsibilities of such citizens, to their tax obligations, to their selective service responsibilities, and laws relating to their rights to marry, to drive automobiles, and to contract. In addition, the right to vote will enable citizens of age 18 to 21 to have a voice in the "increasing numbers of Federal and State programs, especially in areas like education and manpower (which) are directed toward . . . youth." See Memorandum of Senator Kennedy, Part I. 2, *supra*.

In light of such findings, the declaration of Congress that state laws limiting the vote to persons of age 21 and older must be abolished cannot be viewed as "mere *ipse dixit*." The record shows the ample "legislative facts" on which Congress rested its conclusion. Compare *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *South Caro-*

lina v. Katzenbach, 383 U.S. 301 (1966); *United States v. Carolene Products Company*, 304 U.S. 144 (1938).[9]

CONCLUSION

This case ultimately presents the question whether the responsibility for making essential judgments regarding the interpretation of the Fourteenth Amendment should be borne exclusively by the judiciary, or should be shared with the national elected representatives of the people. Title III of the 1970 Voting Rights Act Amendments can only be stricken down on a finding that the power of the Congress under section 5 of the Fourteenth Amendment is merely a "power" to follow and embroider upon the determinations of courts and the even more trivial "power" of offering opinions which the judiciary is free to reject.

The statute can be upheld, on the other hand, on either of two grounds: the tests of *Morgan* that the judiciary must be able to "perceive a basis" for Congress's finding of a need to act to achieve equal protection of the laws; or the analysis of *McClung* and the *Morgan* dissent that the judgment of Congress, if it is supported by an adequate legislative record and is rationally derived from that record, obligates the judiciary to come to a similar conclusion. Both of these approaches recognize a role for Congress in determining the meaning of the Fourteenth Amendment. Neither, on the other hand, forecloses the judiciary from reviewing the action of the legislature and ultimately supervising Fourteenth Amendment adjudication.

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[9]Indeed, Congress has gone further—it has solicited and studied the views of the most eminent constitutional scholars in the United States with regard to the constitutional propriety of enacting Title III. See part I. 4, *supra*. From the standpoint of "legislative facts", a "legislative record" and "legislative conclusions", the task performed by Congress in considering this statute would seem to be a model of responsible legislative action.

One of the arguments offered to the Congress in support of Title III, by Professor Paul Freund, was that "[a]n Act of Congress would provide the court with a strong underpinning for a judgment of unreasonableness [of the 21-year-old requirement] . . . ." that such an act would constitute a "welcome service to the Court." Letter of June 4, 1970, to Representative Carl Albert. It would appear to be no service to the judiciary for the courts to turn away from the aid that has been offered by Congress in Title III of the 1970 Voting Rights Act and to claim a "monopoly of wisdom" in interpreting the command of the equal protection clause. *Kramer v. Union Free School District*, 395 U.S. 621, 638 (1969) (Stewart J., dissenting). As Justice Harlan declared in a different but related context "[t]hose who consider that continuing national respect for the [Supreme] Court's authority depends in large measure upon its wise exercise of self restraint and discipline in constitutional litigation, will view [such a] . . . decision with deep concern." *Baker v. Carr*, 369 U.S. 186, 340 (dissenting opinion).

Respectfully submitted,

William A. Dobrovir
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

H. David Rosenbloom
1101 - 17th Street, N.W.
Washington, D.C. 20036

For YOUTH FRANCHISE COALITION AND THE INDIVIDUAL AMICI

Joseph L. Rauh, Jr.
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

For AMERICANS FOR DEMOCRATIC ACTION

Nathaniel R. Jones
Clarence Mitchell
J. Frances Pohlhaus
1790 Broadway
New York, New York 10019

For NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

David Rubin
1201 - 16th Street, N.W.
Washington, D.C. 20036

For NATIONAL EDUCATION ASSOCIATION

Stephen I. Schlossberg
John A. Fillion
800 East Jefferson Avenue
Detroit, Michigan 48214

For INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS

ATTACHMENT 1

ALABAMA
Ellen Austin
1717 Leighton Ave.
Anniston, Alabama — June 16, 1951

ALASKA
Jacqueline Carr
840 10th Street
Anchorage, Alaska — February 5, 1953

ARIZONA
David Jonathan Edgar
2207 N. Campbell Street
Tucson, Arizona — February 22, 1952

ARKANSAS
Mark Lester
3 Tinnacle Dr.
Little Rock, Arkansas — July 16, 1951

CALIFORNIA
Charles Koppelman
660 Lilac Lane
Sacramento, California — August 1, 1951

COLORADO
William Hughes
3923 S. Sebering Ct.
Denver, Colorado — May 1, 1952

CONNECTICUT
Dennis Person
Cresent Avenue
Farmington, Connecticut — July 8, 1951

DELAWARE
Mary Diane McFaul
772 East Loockerman St.
Dover, Delaware — January 3, 1952

FLORIDA
Jim Ball
3055 Washington St.
Coconut Grove
Miami, Florida — September 23, 1952

HAWAII
Aileen Takichima
1978 Tea Ave.
Honolulu, Hawaii — February 5, 1952

IDAHO
Fred Lily
1517 Ponderay
Boise, Idaho — December 3, 1950

ILLINOIS
Tom Devine
410 Milehull Ct.
Arlington Hgts., Illinois — June 21, 1951

INDIANA
Steven Hamerle
629 Myrtle Pl.
Batesville, Indiana — January 14, 1951

IOWA
William C. Roach
320 S. Vine
West Union, Iowa — May 3, 1951

KANSAS
Steve Millstein
2318 W. 77th St.
Pairie Village, Kansas — August 30, 1952

LOUISIANA
Emile Slulier III
513 Wilson St., Apt. 9
Lafayette, Louisiana — September 9, 1950

MAINE Kenneth Krems 147 Francis St. Portland, Maine	March 8, 1952
MARYLAND Mrs. Gail Gonzales 2117 Guilford Road Hyattsville, Maryland	January 21, 1951
MASSACHUSETTS Elizabeth Densmore 10 Algonquin Rd. Wooster, Massachusetts	January 1, 1952
MICHIGAN Toni Denise Sims 6559 Boxwood Detroit, Michigan	September 24, 1951
MINNESOTA Terry Carlson 1116 Central Red Wing, Minnesota	October 17, 1951
MISSISSIPPI Clifton Wilson 1072 Lynch Jackson, Mississippi	December 26, 1951
MISSOURI Michael Wells 440 W 59th Terrace Kansas City, Missouri	January 10, 1953
MONTANA Karin Olsen 347 No. Main St. Helena, Montana	June 4, 1952

NEBRASKA
Connie Cotner
1127 W 6th St.
Hastings, Nebraska — September 17, 1952

NEVADA
Eric Roberts
900 W. Weasington St.
Carson City, Nevada — June 8, 1952

NEW HAMPSHIRE
Philip Grandmaison
92½ Allds St.
Nashua, New Hampshire — August 15, 1950

NEW JERSEY
Allen Discuillo
25 Park Place
River Plaza, New Jersey — March 18, 1950

NEW MEXICO
Dennis Manzanares
1203 Barcelona St.
Santa Fe, New Mexico — September 20, 1950

NEW YORK
Peter DeGuzna
234 E 35th St.
New York, New York — April 11 1952

NORTH CAROLINA
Micheal Bodenheimer
701 Willamore Ave.
Thomasville, North Carolina — August 4, 1952

NORTH DAKOTA
Peggy Schroeder
Langden, North Dakota — September 5, 1951

OHIO Mary Keefer 540 Terrace Aven. Cincinnati, Ohio	February 28, 1952
OKLAHOMA Tamar Kitchens 1100 S. Tokton Ada, Oklahoma	November 6, 1951
OREGON Bruce Etlinger 2650 SE 175th Pl. Portland, Oregon	June 9, 1950
PENNSYLVANIA Steve Biddle 19 E Newfidd Way Bala-Cynwyd, Pennsylvania	July 3, 1952
RHODE ISLAND Joseph Robinson 79 Whittier Rd. Pantucket, Rhode Island	September 26, 1950
SOUTH CAROLINA Thomas T. Hane III 2648 Craig Road Columbia, South Carolina	June 7, 1951
SOUTH DAKOTA Ted Weiland 403 No. Josephine Madison, South Dakota	January 1, 1951
TENNESSEE *Wendell Hartzog 1757 Nellie Memphis, Tennessee	May 6, 1950

* Has attempted to register to vote but has been refused registration.

TEXAS
Marilyn Hester
804 Adell St.
El Campo, Texas — February 26, 1952

UTAH
Tom Billings
1600 Arlington Dr.
Salt Lake City, Utah — May 19, 1951

VERMONT
Luisa Spencer
Cuttinsville, Vermont — August 26, 1950

VIRGINIA
Daniel Burke
1316 Ivanhoe St.
Arlington, Virginia — September 16, 1950

WASHINGTON
Paul Roberts
7344 40th SW
Seattle, Washington — June 30, 1952

WEST VIRGINIA
Susan Carol Lamp
1206 25th St.
Parkersburg, West Virginia — October 2, 1952

WISCONSIN
Lyn Van Eimeren
812 17th Street
Racine, Wisconsin — October 26, 1950

WYOMING
Nina Roncco
170 N. 4th Street
Laramie, Wyoming — April 5, 1950

DISTRICT OF COLUMBIA
Nora Donovan
2442 39th St., N.W.
Washington, D.C. — March 22, 1952

SEP 15 1970

[illegible], CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, **Plaintiff,**

v.

JOHN N. MITCHELL, Attorney General of the United States, **Defendant.**

BRIEF OF THE PLAINTIFF

LEE JOHNSON
Attorney General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

JACOB B. TANZER
Solicitor General

AL J. LAUE
THOMAS H. DENNEY
Assistant Attorneys General
Attorneys for Plaintiff
322 State Office Building
Salem, Oregon 97310
(503) 378-4402

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

BRIEF OF THE PLAINTIFF

JURISDICTION

The Plaintiff is a State of the United States. The Defendant is a resident of a State other than the Plaintiff and is currently serving as the Attorney General of the United States. The original jurisdiction of the Court is invoked by authority of Article III, Section 2, of the Constitution of the United States and 28 U.S.C. § 1251 (b)(3).

QUESTION PRESENTED

Whether Title III of the Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, 84 Stat. 314, violates the constitutional rights of the Plaintiff and its citizens under Article I, Sections 2 and 4, of the Constitution of the United States, in reducing to 18 the minimum age for voting in all elections.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. art. I, § 2:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *"

U. S. Const. art. I, § 4:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *"

U. S. Const. amend. X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

U. S. Const. amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons

in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U. S. Const. amend. XV:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Oregon Const. art. II, § 2(1):

"Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 21 years of age or older * * *."

Voting Rights Act Amendments of 1970, tit. III, Pub. L. No. 91–285, 84 Stat. 314, is set forth in Appendix A.

STATEMENT

On June 22, 1970, the Congress passed, and the President of the United States approved the "Voting Rights Act Amendments of 1970," Pub. L. No. 91-285, 84 Stat. 314 (hereinafter referred to as the "Act"). Title III of the Act reduces to 18 the minimum age for voting in all elections.

The Act specifically authorizes and directs the Attorney General to enforce its provisions. The defendant wrote to the Governor of each State seeking an affirmative assurance that the State would comply with the Act, indicating that he intended to take action to enforce it if the States did not conform.

The plaintiff commenced this action in original jurisdiction requesting a declaration that Title III of the Act is unconstitutional and that the defendant be permanently enjoined from enforcing the Act.

SUMMARY OF ARGUMENT

The State-federal relationship established by Article I, Section 2, of the United States Constitution places the function of determining reasonable voter qualifications on the individual States. The Constitution and its Amendments allow federal intervention when a State-established qualification operates as a device to deny the citizens of a State their constitutional guarantees. Title III of the Voting Rights Act Amendments of 1970 extends beyond the limitations of permissible congressional intervention and is based upon an unwarranted extension of this Court's holding in *Katzenbach v. Mor-*

gan, 384 U.S. 641 (1966). Classification by age is not and cannot be a denial of equal protection of the laws.

ARGUMENT

I.

THE FEDERAL RELATIONSHIP REQUIRES CONTINUED RECOGNITION OF THE COMPETENCY OF EACH STATE TO ESTABLISH PROPER MINIMUM VOTER QUALIFICATIONS.

In reducing the minimum age for voting in all elections to 18, Title III of the Act conflicts with the Constitution of the plaintiff State and with Article I, Section 2 of the United States Constitution.

The Constitutional Convention of 1787 debated the question of how voter qualifications should be determined. It was decided then that this was within the competency of the individual states.

The considerations of the framers have been set out in *The Federalist*, the work which is "justly supposed to be entitled to great respect in expounding the constitution."①

> "It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or pri-

① M'Culloch *v.* Maryland, 17 U.S. (4 Wheat.) 316, 433 (1819).

marily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

* * *

"Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments? The violation of principle, in this case, would have required no comment; and, to an unbiased observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect, to the pleasure of the State governments. An impartial view of the matter cannot fail to result in a conviction, that each, as far as possible, ought to depend on itself for its own preservation." The Federalist No. 59, at 404-405 (Bourne ed. 1901) (Hamilton).

Variety is the vital heart of federalism; homogeneity deadens it. Federalism rests upon diversity as an essential quality within constitutional guarantees. The various social experiments available are evidenced by the lowering of the voting age from the historical and traditional 21 by the States of Georgia, Hawaii, Alaska and Kentucky. The value of so doing is yet to be assessed. Other

States may follow, the Constitution may be amended, or the experiment may fail. Had Congress earlier interfered to homogenize the electoral process it could well have smothered Oregon's innovation in popular democracy, the initiative and referendum procedures,[9] as well as subsequent social experiments by other States.

The essential quality of the federal system has consistently been left undisturbed by this Court. In the case challenging exclusion of women from voting, *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), in which it was urged that the exclusion was a violation of equal protection of the laws guaranteed by the Fourteenth Amendment, the Court stated:

> "* * * If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we can find it is within the power of a State to withhold." 88 U.S. (21 Wall.) at 178.

In upholding residency requirements for voting in State elections in *Pope v. Williams*, 193 U.S. 621 (1907), the Court stated:

> "* * * In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such

[9] See Oregon Const. art. IV, § 1.

terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." 193 U.S. at 632.

The function of the States in determining voter qualification was affirmed when the right to vote in a primary election was held to be guaranteed by the Constitution.

"Pursuant to the authority given by § 2 of Article 1 of the Constitution, and subject to the legislative power of Congress under § 4 of Article 1, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress." *United States v. Classic*, 313 U.S. 299, 311 (1940).

In upholding literacy tests, *per se*, a unanimous Court, speaking through Mr. Justice Douglas, has stated:

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, *age*, previous criminal record * * * are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959) [emphasis added].

The right of the States to set qualifications for the exercise of the franchise on a non-discriminatory basis has continued to be emphasized by the Court in recent decisions.

"* * * There can be no doubt either of the historic function of the States to establish, on a non-discriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of

the franchise. Indeed, '[t]he States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' Lassiter v. Northampton Election Bd., 360 U.S. 45, 50. Compare United States v. Classic, 313 U.S. 299; Ex parte Yarbrough, 110 U.S. 651. 'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' Pope v. Williams supra, at 632." *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

The Court has consistently refrained from interfering with each State's proper exercise of its responsibility to determine the requisite qualifications for voters "within its jurisdiction."

In eliminating invidious State restrictions, the Court has recently recognized the basic franchise elements that are within the competency of the States.

> "* * * Appellant agrees that the States have the power to impose reasonable citizenship, *age*, and residency requirements on the availability of the ballot." *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969) [emphasis added].

In cases related to *Kramer*, the Court speaks repeatedly of "qualified voters" and "otherwise qualified voters." See *Cipriano v. City of Houma*, 395 U.S. 701, 704n.4 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

Previous expansions of suffrage have consistently been accomplished by Constitutional amendments. See,

e.g., Amendment XV (race); Amendment XVII (direct Senatorial election); Amendment XIX (women's suffrage); Amendment XXIII (limited District of Columbia voting); Amendment XXIV (elimination of poll tax).

II.

TO SUPERSEDE A STATE-ESTABLISHED VOTER QUALIFICATION, CONGRESS MUST FIND THAT THE QUALIFICATION HAS BEEN USED BY THE STATE AS A DEVICE TO DENY EQUAL PROTECTION OF THE LAWS.

Each State has the right to establish non-discriminatory voter qualifications pursuant to the United States Constitution. Title III of the Act raises the question whether Congress can enact legislation which supersedes the qualifications established by the particular States in the absence of any finding that the qualification has been used by the State as a device to deny voters equal protection of the laws.

A. *Katzenbach v. Morgan* does not eliminate the necessity of a finding by Congress that an otherwise reasonable classification will operate as an invidious discrimination.

The power of Congress to enact Title III of the Act was discussed at great length before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate. There was further discussion before the Judiciary Subcommittee on Constitutional Amendments on March 10, 1970, 116 Cong. Rec. 3511 (daily ed. March 11, 1970), and extensive debate on

the floor of the United States Senate on March 11, 1970. *Id.* at 3474-3517.

Throughout these hearings, and in the argument on the floor of the Senate, the question of the power of Congress to enact legislation lowering the minimum voting age in all State and federal elections was debated. Those endorsing the power relied upon the Court's opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

That opinion was predicated upon the fact that Congress determined on the evidence that violations of equal protection existed and formulated a solution to those problems. Thus, the Court exercised appropriate restraint:

> "* * * It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

No such violations of equal protection appear in this legislative record, as indeed they cannot.

Katzenbach v. Morgan arose out of a New York literacy qualification statute which had the effect of denying equal protection of the laws to many of New York's Puerto Rican citizens. *Katzenbach v. Morgan* applies to legislation founded upon denial of equal protection. The attempt to use it to support legislation absent a showing of denial of equal protection is an unwarranted extension of the Court's holding.

Much to the consternation of the proponents, the thrust of *Katzenbach v. Morgan* was ably explained before the Senate Judiciary Subcommittee on Constitu-

tional Amendments by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel. Mr. Rehnquist made graphically clear the impossibility of finding a denial of equal protection in the equal application of minimum voting age requirements.

> "* * * [N]ot only is the voting age requirement of 21 not discriminatory against any defined class by its terms, but it is not discriminatory in result, at all. We do not here have a situation where the test, though fair on its face, discriminates *in result* between classes which may not be discriminated between *in terms* under the Fourteenth Amendment. There is not the slightest indication that the 18- to 21-year-old voting group in any particular state or in the United States as a whole, is composed of markedly larger numbers of Negroes, women, Spanish-Americans, or any other group which has been the subject of overt discrimination. This, in my opinion, is the principal and very significant factual difference between the 18-year-old vote law and section 4(e) of the Voting Rights Act.
>
> "When we deal with 18-year-old voting, we reach no secondary result by applying the statutory voting age requirements—the only identifiable class affected is that set forth in the state voting law in so many words—the class of potential voters between the age of 18 and 21. In contrast, the New York literacy test, although by its terms barring only illiterates, had the result of discriminating against, if not barring, a secondary identifiable class against whom discrimination was prohibited under the Fourteenth Amendment.
>
> "Finally, one may ask, what is the 'discrimination' which Congress would here seek to eliminate? Unless voting is to be done from the cribs the minimum age line must be drawn somewhere; can it really be said that to deny 20, 19, and 18-year-olds the vote is 'dis-

crimination', while to deny the vote to 17-year-olds is sound legislative judgment?

"It is pointless to further elaborate the matter. The Committee and the Congress is faced with one Supreme Court decision on the entire subject, and the reasoning of that decision is not one that he who runs may read. There are striking factual differences between the facts of *Morgan* and the facts that would be involved in determining the validity of a voting age statute; the fact that 46 states presently impose a 21-year-old voting requirement; the fact that 21 was the voing age requirement unanimously enforced by the states which adopted the Constitution; and the fact that a voting age law is one which applies to all citizens alike without resulting in any identifiable discrimination—my conclusion is that *Morgan* is not strong support for the validity of such a statute." 116 Cong. Rec. 3513 (daily ed. March 11, 1970).

In *Katzenbach v. Morgan*, the Court stated:

"* * * Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an indivious discrimination in violation of the Equal Protection Clause." 384 U.S. at 656.

At no place in the legislative history of Title III of the Act is there any showing that the requirement of a minimum voting age of 21 by those States having such a requirement operates as a discrimination on the basis of race, national origin, creed, or sex.

B. Minimum voting age cannot be an invidious discrimination that is prohibited by Section 1 of the Fourteenth Amendment.

Congress was unable to find that denial of vote to persons under 21 constitutes discrimination. Classification by age cannot operate as a discrimination, for the clear reason that the passage of time, the sole criterion upon which the classification is based, is completely impartial—and is applicable equally to all persons.

Mr. Justice Brandeis in the dissent in *National Life Ins. Co. v. United States*, 277 U.S. 508 (1928), defined discrimination as "the act of treating differently two persons or things, under like circumstances." 277 U.S. at 530. The difference between an eighteen year old and a twenty-one year old is three birthdays, nothing more and nothing less. Measured by the criterion established, the passage of time, no discrimination can ever be found between the two as they can never, by the criterion, be in like circumstances. They are inevitably in different circumstances as to age.

It is impossible to find discrimination in a classification by age. Mr. Justice Frankfurter has told us "No court can make time stand still," *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942), and neither can any sheriff, election board, State officer or legislature vary time's application to one citizen as distinguished from another.

The distinction between the legislation that is the subject of this action and that which was interpreted in *Katzenbach v. Morgan* is pointed out in the dissent of

Mr. Justice Black in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), decided the same term as *Katzenbach v. Morgan*.

"* * * The mere fact that a law results in treating some groups differently from others does not, of course, automatically amount to a violation of the Equal Protection Clause. To bar a State from drawing any distinctions in the application of its laws would practically paralyze the regulatory power of legislative bodies. Consequently 'The constitutional command for a state to afford "equal protection of the laws" sets a goal not attainable by the invention and application of a precise formula'. Kotch v. River Port Pilot Comm'rs, 330 U.S. 552, 556. Voting laws are no exception to this principle. All voting laws treat some persons differently from others in some respects. *Some bar a person from voting who is under 21 years of age; others bar those under 18.* Some bar convicted felons or the insane, and some have attached a freehold or other property qualification for voting. * * *

"* * * The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not 'irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious.' These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however * * * are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act." 383 U.S. at 672-674 [emphasis added].

Mr. Justice Black, who joined in the majority in

Katzenbach v. Morgan, explained the reach of that decision in his dissent in *Harper, supra*, when he continued:

> "I have no doubt at all that Congress has the power under § 5 [of the 14th Amendment] to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws." *Id.* at 679.

Under *Katzenbach v. Morgan*, to intrude upon the States' prerogative, Congress must first find upon some evidence that a minimum voting age of 21 is being used as a device to deny voters equal protection of the laws. Title III of the Act states that the minimum voting age requirement is a "* * * particularly unfair treatment * * * in view of national defense responsibilities", although it is no more unfair than requiring children to attend schools regulated by school boards they did not elect.

Title III further states that a minimum voting age of 21

> "* * * has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution",

although Title III itself denies the same guarantees to those 17 or less. Neither Title III nor its history discloses any more substantial finding of constitutional justification than these bare recitals.

The Constitution reposes in the States the general competence to act in setting the minimum voting age of their electorates. The bare recitals of the Act that equal

protection of the laws is denied does not and cannot constitute a finding that the classification is "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." The mere subjective conclusion that denying the vote to eighteen to twenty-one year olds is "unfair" is not a substitute for the more objective standard that the classification must be invidious, irrational, or arbitrary. Any classification may seem unfair to those who are benefited less thereby, but this does not mean that the classification is wholly irrational. The testimony and debates on Title III fail to support such a finding.

Classification by age is rational, as evidenced by its continued use in legislative enactments. It is relevant to the determination of the qualifications of a responsible elector. It is eminently reasonable, as is shown by its continued use by 46 States and by the framers of the Fourteenth Amendment itself. It is no more arbitrary than any other classification and cannot operate invidiously as it is no respecter of persons.

> "* * * The 14th Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed." *Hayes v. Missouri*, 120 U.S. 68, 71 (1887)

Federal power to lower the minimum voting age is grounded by its proponents on the power given Congress under Section 5 of the Fourteenth Amendment to legis-

late against denial by States of "equal protection of the laws." It is urged that classification by age is such a denial of equal protection. Yet, the framers of the Fourteenth Amendment itself established that classification at age 21.

> "* * * But when the right to vote at any election for * * * the Executive and Judicial officers of a State or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2 [emphasis added].

Within the very context of the amendment restricting the States from denying the equal protection of the laws to their citizens we therefore find classification as to age being used as a standard to accomplish its ends.

The Amendment recognizes the power of the States to set voter qualifications and acknowledges that a denial of the franchise to individuals under 21 does not contravene the grand generalities of Section 1. It is evident that the framers of the Fourteenth Amendment did not forbid the States from denying or abridging the right to vote, but instead provided a remedy which is strictly correlated to the impact of the abridgment upon the federal system. Thus, the Fourteenth Amendment carefully describes the area of federal competence. The clear import of the Amendment is that the sole area

of federal concern, and therefore federal power to act, on questions of voter qualifications is with the federal representative structure. Title III, to the contrary, reaches beyond the parameters of federal concern to elections of entirely local interest.

Our construction of the Fourteenth Amendment is supported not only by the clear language of the Amendment itself, but by a contemporaneous interpretation by its proponents, one of whom, Representative Bingham, stated in debate in Congress:[9]

> "To be sure we all agree, and the great body of the people of this country agree, that *the exercise of the elective franchise though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.*" Cong. Globe, 39th Cong., 1st Sess. 2542 (1866) [emphasis added].

This Court has continued to refuse to allow Congress to control the exercise of the elective franchise by the simple invocation of the Fourteenth Amendment.

> "* * * The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has *from the time of his majority* a right to vote for presidential electors." *McPherson v. Blacker*, 146 U.S. 1, 39 (1892) [emphasis added].

See also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1969).

---

[9] As quoted by Mr. Justice Harlan in his dissent in *Reynolds v. Sims*, 377 U.S. 533, 599 (1964).

C. That classification by age is not a denial of equal protection is clearly manifested by its extensive use in state and federal legislation.

The assertion that classification by age is a discriminatory denial of equal protection of the laws is contravened by the many areas of state and federal legislation utilizing the method. The plaintiff State, for example, uses age for classification of such rights as the right to obtain a motor vehicle operator's license (Oregon Revised Statutes [hereinafter cited as ORS] 482.110), to use tobacco in a public place (ORS 167.250), to play cards, billiards, pool, bagatelle, or other games of chance (ORS 167.295), to be employed in places of public amusement or entertainment (ORS 167.235), to obtain hunting and fishing licenses (ORS 497.010), to pledge articles to pawnbrokers (ORS 726.270(2)), and to wager on races (ORS 462.190).

Classification by age permeates the entire body of state legislation on such important matters as Workmen's Compensation (ORS ch. 656), the age of consent and sexual abuse (ORS ch. 167), testamentary disposition and wills (ORS ch. 112), guardianships (ORS ch. 126), adoption and parental support (ORS ch. 109) and the determination of the age of majority.

> "Except as provided in ORS 109.520, in this state any person shall be deemed to have arrived at majority at the age of 21 years, and thereafter shall have control of his own actions and business, have all the rights and be subject to all the liabilities of a citizen of full age." ORS 109.510.
>
> "Except as provided in ORS 653.105, all persons shall be deemed to have arrived at the age of ma-

jority upon their being married according to law." ORS 109.520.

Classification by age equally pervades the constitutions and statutes of the federal government and of the other States of the United States. A practical legislative tool with this historical and universal endorsement cannot be condemned as an invidious discrimination denying equal protection of the laws.

CONCLUSION

Title III of the Voting Rights Act Amendments of 1970, being contrary to Article I, Section 2, of the United States Constitution and not authorized by Section 5 of the Fourteenth Amendment to that Constitution, should be declared unconstitutional and the defendant restrained from enforcing that portion of the Act.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

JACOB B. TANZER
Solicitor General

AL J. LAUE
THOMAS H. DENNEY
Assistant Attorneys General
322 State Office Building
Salem, Oregon 97310
(503) 378-4402

September, 1970

APPENDIX

VOTING RIGHTS ACT AMENDMENTS OF 1970

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

DECLARATION AND FINDINGS

"Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary

or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"Sec. 303. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"Sec. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

SUPREM

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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 44 ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES

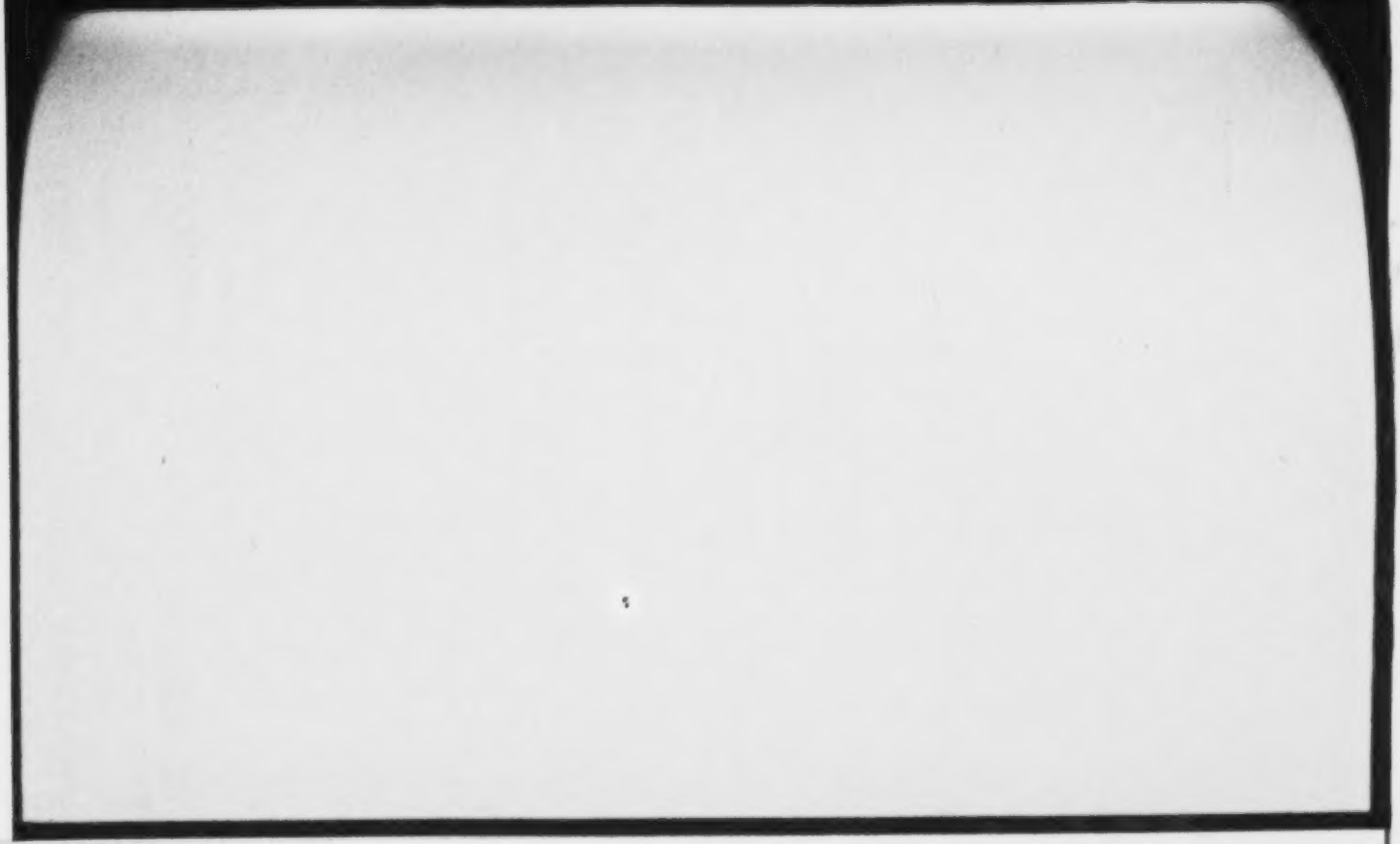
Defendant

* * *

BRIEF FOR THE PLAINTIFF

* * *

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant
ALFRED WALKER
Executive Assistant
J. C. DAVIS
Assistant Attorney General
W. O. SHULTZ II
Assistant Attorney General
JOHN REEVES
Assistant Attorney General
Box 12548, Capitol Station
Austin, Texas 78711
CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705
Attorneys for Plaintiff



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NO. 44 ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL
OF THE UNITED STATES

Defendant

* * *

BRIEF FOR THE PLAINTIFF

* * *

JURISDICTION

This Court has original jurisdiction of this action under the provisions of Article III, Section 2, of the Constitution of the United States and Section 1251 (b)(3) of Title 28, United States Code.

STATUTE INVOLVED

Title III of Public Law 91-285, known as The Voting Rights Act Amendments of 1970, provides as follows:

Declaration and Findings

Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but

not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens.

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

Prohibition

Sec. 302. Except as required by the Constitution no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

Enforcement

Sec. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Definition

Sec. 304. As used in this title the term State includes the District of Columbia.

Effective date

Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

STATEMENT

Article VI, Sections 1 and 2, Constitution of Texas (Vernon's), and Articles 5.01 and 5.02, Texas Election Code (Vernon's), provide, as one of the qualifications for voting in the State of Texas, that a person shall have attained the age of twenty-one years. (See Appendix.) This qualification applies to all elections: federal, state and local.

Purporting to act pursuant to Section 5 of the Fourteenth Amendment of the Constitution of the United States, the Congress enacted, and the President approved, Public Law 91-285, known as The Voting

Rights Act Amendments of 1970 (hereinafter referred to as the Act). Title III of the Act provides that no citizen of the United States, otherwise qualified to vote in any state, shall be denied the right to vote in any election if the citizen is eighteen years of age or older. The Attorney General of the United States is authorized and directed by the Act to compel the various states of the Union to comply with Title III of the Act.

Because Section 302 of Title III of the Act purports to nullify and abolish the voting age qualification established by the above mentioned provisions of the Constitution and statutes of the State of Texas, Plaintiff brough this action seeking a judgment of this Court decreeing that the Congress, by enacting Title III of the Act, has exceeded its powers under the Constitution.

SUMMARY OF ARGUMENT

The power of Congress to legislate with regard to a particular subject must be founded upon a grant of authority under the Constitution of the United States. Neither Section 5 of the Fourteenth Amendment, nor any other provision of the Constitution, grants to Congress the power to impose upon the states its own arbitrary criteria for a minimum voting age and prescribe a penalty for those states that do not choose to follow that standard.

The decisions of this Court have long held that the states have a wide scope of authority with regard to the qualifications and standards necessary for voting. As long as the qualifications set by the states are reasonable and nondiscriminatory, they are permissible. Indeed, Article I, Section 2, of the Constitution and the Seventeenth Amendment specifically provide that

the qualifications for electors for members of the House of Representatives and the Senate shall be the same as is required for electors of the most numerous branch of the state legislature. Undoubtedly, from a constitutional standpoint and a historical standpoint, the several states have the right to prescribe the age at which a person becomes qualified to vote. Section 2 of the Fourteenth Amendment specifically recognizes the power of the states in this regard and imposes a penalty upon those states that set the limit above twenty-one years of age.

Title III of the Act must fall because it is beyond the power conferred upon Congress and effectuates a denial of a right which the Constitution specifically leaves to the various states. It is inconsistent with both the letter and the spirit of the Constitution.

ARGUMENT

I. The Power of Congress under Section 5 of the Fourteenth Amendment is Limited to Legislation That is Consistent with the Letter and Spirit of the Constitution.

By Section 302 of the Voting Rights Act Amendments of 1970, Pub.L. 91-285, Congress has undertaken to provide that, except as required by the Constitution, no citizen otherwise qualified to vote who is 18 or older shall be denied the right to vote in any election on account of age. If valid, this will supersede constitutional and statutory provisions in Texas, and in 45 other states, limiting the franchise to those 21 years of age or older, and in two other states that set 19 or 20 as the limit. The congressional power to make this drastic change, if it exists at all, must be based on Section 5 of the Fourteenth Amendment, giving Congress

"power to enforce, by appropriate legislation," the provisions of that amendment.

This Court has spoken only once on the meaning of Section 5. In *Katzenbach v. Morgan,* 384 U.S. 641 (1966), the Court upheld § 4(e) of the Voting Rights Act of 1965, Pub.L. 89-110, as a valid exercise of the power granted by that section of the Fourteenth Amendment. In the *Morgan* case the Court made two important pronouncements about Section 5.

First, it held—as it had held shortly before with regard to the similar Section 2 of the Fifteenth Amendment, *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966)—that the classic formulation by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819), of the meaning of the Necessary and Proper Clause is the measure also of the power to "enforce, by appropriate legislation" granted by Section 5.

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

384 U.S. at 650. Texas has no quarrel with that portion of the *Morgan* decision.

Second, the Court said in *Morgan,* 384 U.S., at 648-649, that under Section 5 Congress may strike down state laws where it deems this necessary in order to assure the equal protection of the laws even though those state laws would be valid if tested only against the Equal Protection Clause by itself. With respect, Texas is unpersuaded by this portion of the *Morgan* decision. The historical evidence with regard to Section 5 points in an opposite direction. Burt, *Miranda*

and Title II: A Morganatic Marriage, 1969 SUP.CT.REV. 81, 84-100; Bickel, *The Voting Rights Cases,* 1966 SUP.CT.REV. 79, 97. As a matter of logic it would seem that particular state action either does or does not deny to persons within its jurisdiction the equal protection of he laws. If it does, a court must hold the state action unconstitutional and Congress has power to enact legislation with regard to it. If it does not, then neither the courts nor Congress are authorized to act. Admittedly, it is often difficult to determine what is a denial of equal protection, and a declaration by Congress must be given great weight, but since *Marbury v. Madison,* 1 Cranch 137 (1803), it has been the central premise of our constitutional system that this Court is the ultimate arbiter of the meaning of the Constitution. Finally, to hold that Congress may decide for itself what is meant by Section 1 of the Fourteenth Amendment puts in jeopardy the cherished liberties thought safeguarded by that provision. Despite the assurance offered by footnote 10 of the *Morgan* opinion on this point, 384 U.S. at 651, even those sympathetic to the *Morgan* case generally have found it difficult to see how Section 5 gives Congress authority to expand equal protection but not to narrow it, and have suggested that "the footnote, therefore, may not be the end of he argument." Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV.L.REV. 91, 106 n. 86 (1966). See also Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP.CT.REV. 81, 118; 116 CONG. REC. H5649 (daily ed. June 17, 1970) (letter from Prof. Gerald Gunther).

The view we here put forward does not limit Congress to an insignificant role in implementing the Fourteenth Amendment. Under that amendment, as with others, it is often the case that the hardest problem is

not in deciding whether the constitutional command is being violated but in devising an adequate remedy to cure the situation. Here Congress has a wide area of choice and can provide effective remedies that would be beyond the power of the judiciary. Cf. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924). On this view the Court and the Congress have complementary roles, with the Court deciding when the Constitution is being violated and Congress empowered to provide appropriate remedies to enforce the Constitution.

If we are right about this, it is the end of the matter. As will be developed in more detail in the following section, it is beyond belief that a court would hold that to require that voters be 21 or older is a denial of the Equal Protection Clause standing alone. If that is so, on the view we take of Section 5 Congress may not, by fiat, deal with laws so requiring as if they were a denial of equal protection.

But even if we are wrong in our understanding of Section 5, and of the relation of this Court to the Congress in enforcing the Fourteenth Amendment, this statute still must fall. Legislation adopted under Section 5, even if it may be regarded as an enactment to enforce the Equal Protection Clause, still must meet the test that it be consistent with "the letter and spirit of the constitution." 384 U.S. at 656. Section 302 of the Voting Rights Act Amendments of 1970 does not.

II. Section 302 of the Voting Rights Act Amendments of 1970 is Contrary to Both the Letter and the Spirit of the Constitution.

Voting qualifications are now referred to in terms at six different places in the Constitution. The original

document provided, in Article 1, Section 4, that in elections for the House of Representatives "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." This provision was not inserted by happenstance.

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone. To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option.

THE FEDERALIST, No. 52, at 360 (Wright ed. 1961) (Madison).

The Seventeenth Amendment sets out precisely the same test for voters in Senate elections. Thus the states were left free to set their own qualifications for voters. Those that a state determined were qualified to vote for members of the most numerous branch of the state legislature were, by that fact, qualified to vote for Representatives and Senators.

Other amendments limited in terms the qualifica-

tions the states might impose on the right of suffrage. Qualifications based on race or sex are barred by the Fifteenth and Nineteenth Amendments. The Twenty-Fourth Amendment prohibits requiring a poll tax for a national election. Finally Section 2 of the Fourteenth Amendment reduces a state's representation in Congress if

> the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime * * *.

There is one other limitation on the freedom of the states in this matter, though it is not stated as explicitly in the Constitution. Whatever the intention of the framers of the Fourteenth Amendment may have been—compare *Reynolds v. Sims,* 377 U.S. 533, 593-615 (1964) (dissenting opinion) with Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress,* 1965 SUP.CT.REV. 33—it is settled by recent decisions that invidious or irrational distinctions with regard to voting qualifications, as with all other matters, are prohibited by the Equal Protection Clause of the Fourteenth Amendment. *Carrington v. Rash,* 380 U.S. 89 (1965); *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); *Evans v. Cornman,* 398 U.S. 419 (1970).

The overall pattern has a clarity that is lacking on many constitutional questions. The letter of the Con-

stitution leaves it to the states to set voting qualifications, subject only to broad limitations imposed by the Constitution itself. And it is specifically recognized in the letter of the Constitution that a state may require that voters be 21 years of age. If a state chooses to set a voting age higher than 21, it is subject to the penalties of Section 2 of the Fourteenth Amendment. It is subject to no penalties if it sets the age at 21 or some lower figure. In *Minor v. Happersett,* 21 Wall. 162, 174 (1874), the Court quoted Section 2 and said: "Why this, if it is not in the power of the legislature to deny the right of suffrage to some male inhabitants?" Equally, why this, if it is not in the power of the legislature to deny the right of suffrage to persons under 21?

This understanding of the constitutional pattern about voting qualifications has often been recognized by this Court. Thus in *Pope v. Williams,* 193 U.S. 621, 632 (1904), the Court said:

> In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.

Only 11 years ago a unanimous Court said, in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45, 51 (1959):

> We do not suggest that any standards which a State desires to adopt may be required of voters. But there is a wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record (Davis v. Beason, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters.

In the first case in which voting qualifications created by a state were held to violate the Equal Protection Clause, the Court was at pains to emphasize the broad area of choice still left open to the states. The Court said, in *Carrington v. Rash,* 380 U.S. 89, 91 (1965):

> Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. Pope v. Williams, 193 U.S. 621. There can be no doubt either of the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.

The case which goes farthest in asserting a right in the judiciary to review the qualifications set by the states is *Kramer v. Union Free School District,* 395 U.S. 621 (1969). The Court there called for "exacting judicial scrutiny of statutes distributing the franchise," 395 U.S. at 628, and said that the general presumption of constitutionality does not apply to statutes denying some residents the right to vote. 395 U.S. at 627-628. Indeed there are those in Congress who have taken certain language from the *Kramer* opinion as demonstrating that the states may no longer require that voters be 21. 116 CONG.REC. H5643 (daily ed. June 17, 1970) (Rep. McCulloch). A full reading of the *Kramer* opinion shows that it will not support such an interpretation and indeed that it points strongly in a contrary direction. The Chief Justice began his opinion for the Court by saying:

> At the outset, it is important to note what is *not* at issue in his case. The requirements of §2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the

States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot. Cf. Carrington v. Rash, 380 U.S. 89, 91 (1965); Pope v. Williams, 193 U.S. 621 (1904).

The Chief Justice then referred to the close scrutiny given apportionment statutes that may dilute the effectiveness of votes, and continued:

> No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

395 U.S. at 626-627. These repeated references recognize the power of the states to set reasonable qualifications with regard to age, citizenship, and residency. It is less familiar kinds of qualifications that arouse suspicion and can stand only if shown to be justified by a compelling state interest.

The Texas laws requiring that voters be 21 years old do not violate the Equal Protection Clause. There is here no "invidious discrimination" such as could be found in *Katzenbach v. Morgan,* 384 U.S. 641, 654-656 (1966). Texas has not introduced "a capricious or irrelevant factor," as Virginia was found to have done in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668 (1966). As Professor Herbert Wechsler has commented,

> age is obviously not irrelevant to qualifications; and since any age criterion involves the drawing of an arbitrary line fixing the age at twenty-one most certainly is not "capricious."

116 CONG.REC. H5649 (daily ed. June 17, 1970).

This Court has specifically recognized in *Lassiter* and in *Kramer* that age is relevant to voting qualifications and that it is for the states to set the age. Texas treats each of its citizens alike. Each must achieve the age of 21 before he or she is permited to vote. Some age requirement is necessary in order to protect the state's interest in a mature and well-informed electorate. What is involved is not discrimination but only a legislative preference for one figure instead of another in an area in which a choice must be made. That 45 other states have drawn the line at the same place as Texas, and that Section 2 of the Fourteenth Amendment explicitly draws the line at the same place, shows that the choice by Texas is not an unreasonable one.

A line drawn at 21—or at 18 or at any other age—is necessarily arbitrary. "* * * [S]ome college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line drawn that is essential to law making." *Kramer v. Union Free School District,* 395 U.S. 621, 637 (1969) (dissenting opinion). "It surpasses belief that the Constitution authorizes Congress to define the 14th Amendment's equal-protection clause so as to outlaw what the Amendment's next section approves." 116 CONG.REC. H5648 (daily ed. June 17, 1970) (statement of Professors Bickel, Black, Bork, Ely, Pollak, and Rostow).

If Section 302 of the Voting Rights Act Amendments

of 1970 can stand, then Congress has plenary power under Section 5 of the Fourteenth Amendment to set voting qualifications. There is no argument that can be made for this statute that could not equally well be made for any other Act of Congress changing qualifications established by the states. This statute presupposes that on a matter of legislative preference, on which a choice must be made, Congress may substitute its preference for that of the states, despite express constitutional provisions leaving it with the states to make the choice.

On that view, the Fifteenth, Nineteenth, and Twenty-Fourth Amendments were wholly unnecessary. Congress could have achieved the goals to which those amendments were directed by simple legislation and did not need to set in motion the cumbersome machinery of constitutional amendment. It may be argued—though it turns somersaults with history to do so—that the method of constitutional amendment was chosen in each of those instances in order to assure that the change would be a permanent one, not subject to repeal by some future Congress. The Seventeenth Amendment, however, will not yield to even that sophistic analysis. Forty-five years after the Fourteenth Amendment was ratified Congress and the states determined that Senators should be elected by those persons qualified to vote for members of the most numerous branch of the state legislature. If Section 5 of the Fourteenth Amendment allows Congress to set qualifications, what reason could there have been to write again into the Constitution years later the familiar provision that it is for the state to set qualifications?

An alternative argument was presented in the *Morgan* case that may seem to lend support to the legis-

lation now in question. Even though requiring voters to be 21 is not in itself an invidious discrimination nor a denial of equal protection, it may be argued that the enhanced political power purportedly given to those between 18 and 21 "will be helpful in gaining nondiscriminatory treatment in public services" for those in that age bracket. 384 U.S. at 652. This argument could be used whenever Congress undertakes to allow those not previously qualified by state law to vote.

> If Congress may freely bestow the vote as a means of curing other discriminations, which it fears may be practiced against groups deprived of the vote, essentially because of this deprivation and on the basis of no other evidence, then there is nothing left of state autonomy in setting qualifications for voting. The argument proves too much.

Bickel, *The Voting Rights Case,* 1966 SUP.CT.REV. 79, 100.

From 1868 to 1966 no one supposed that the bland words of Section 5 of the Fourteenth Amendment had transferred from the states to Congress the power to make reasonable and nondiscriminatory choices about voting qualifications. The presumption is powerful that such a far-reaching, dislocating construction as the United States now asks the Court to find in that constitutional provision was not uncovered by Congress, the courts, lawyers, or scholars for almost a century because it was not there.

Indeed the distinguished counsel for the successful appellants in *Morgan* disclaimed any reliance on such a novel doctrine.

> * * * [W]e freely concede the primary responsibilities of the States in this area and assert no general power in the national legislature to sub-

stitute its own mere preferences for the reasonable qualifications fixed by State law.

Brief for Appellants at 43, *Katzenbach v. Morgan,* 384 U.S. 641 (1966). That statement is consistent with what the Constitution says. It is consistent with what the Constitution has always been understood to mean.

The *Morgan* case differs in so many imporant respects from the present case that it cannot be regarded as decisive here or as establishing the doctrine that the then-Solicitor General disclaimed in that case. The differences have been well summarized by Professor Paul G. Kauper, and it is simpler to quote, rather than to paraphrase, his statement.

> In summary, there are very substantial differences between the English literacy test problem presented in *Morgan* and the voting age problem. In its legislation at issue in *Morgan,* Congress was directing its attention to a voting qualification, namely, the English literacy test, which has had a limited history in this country, which Congress found to be an unwarranted discrimination against a discrete ethnic group, and which for all practical purposes was limited in its operation to one state in the country. Moreover, Congress has a special federal concern with protection of Puerto Ricans against discrimination in view of the historic relationship between the United States and Puerto Rico, and the Congressional policies which have encouraged migration from Puerto Rico to the United States. Also it is not clear that the Supreme Court would not have invalidated the New York literacy test required as to Puerto Ricans even without the federal statute as an invidious discrimination violating the equal voting clause had it proceeded to face this question in the *Cardona* case. The voting age question, on the other hand, presents no factor of this kind. On the contrary, state voting age limits have a long unbroken his-

> tory, they deal with a qualification which does not enter into the sensitive area of race, nationality, ethnic affiliations or economic status, they present no distinctive aspects related to matters of federal authority and concern, and, indeed, the authority of the state to fix an age limit is confirmed in the very language of the Fourteenth Amendment. Here the factors are so heavily weighted in favor of the state power and the basis for Congressional intrusion into this area is so tenuous, that I cannot regard *Morgan* as determinative of the constitutional issue raised by the proposed legislation.

116 CONG.REC. H5653 (daily ed. June 17, 1970).

Nothing that we have argued here goes at all to the question whether it is wise or unwise to require that voters be 21. The wisdom of legislation is no concern of this Court. Nor, we submit, is the wisdom of state legislation fixing reasonable qualifications for voting any concern of the Congress. The Constitution vests in the states the power to decide what is wise in this regard.

The Fourteenth Amendment was a momentous step to preserve equality of rights and to prevent discrimination as between citizens. It was not intended to change radically the whole theory of the relations of the state and federal governments to each other, *McPherson v. Blacker,* 146 U.S. 1, 39, (1892), nor to supplant constitutional federalism with congressional federalism. If it is thought desirable to limit the freedom of the states in choosing a voting age, there is a constitutional way to accomplish this, just as was done in 1870 and 1920 and in 1964. Impatience with the process of constitutional amendment is no justification for a shortcut that ignores both the letter and the spirit of the constitution and that disregards both the pur-

poses of a written constitution and the position of the states in the constitutional scheme.

More than 50 years ago Harold Laski spoke of those "who are convinced that where national thought is, generally speaking, superior in quality to State thought, where it is temporally in advance, national, that is to say centralised action should follow. The sovereign, in fact, should show his powers of self-assertion. Where he is in possession of a progressive idea which fails to obtain sanction in a backward state, then he should use his reserve power in compensation for its reactionary character." Laski, STUDIES IN THE PROBLEMS OF SOVEREIGNTY 281 (1917). He was unpersuaded by those who took that view and concluded that the nation gains more from the slow and often painful struggle of states to accept the new wisdom than from the irritating imposition from without of a belief to which they have not been converted. *Id.* at 282. So it is here. If the arguments for lowering the voting age to 18 are as compelling as the supporters of this legislation believe, then they should have no difficulty in persuading the states to make this change on their own, or to ratify a constitutional amendment making the change for the entire republic. The Constitution of the United States does not allow them to achieve the change by congressional *ipse dixit*.

CONCLUSION

For all of the foregoing reasons, this Court should grant Texas the relief prayed for in the complaint.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

J. C. DAVIS
Assistant Attorney General

W. O. SHULTZ II
Assistant Attorney General

JOHN REEVES
Assistant Attorney General

Box 12548, Capitol Station
Austin, Texas 78711

CHARLES ALAN WRIGHT
2500 Red River Street
Austin, Texas 78705

Attorneys for Plaintiff

PROOF OF SERVICE

I, Crawford C. Martin, Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of ----------, 1970, I served the foregoing Brief for the Plaintiff upon the Defendant by depositing a copy in the United States mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530.

CRAWFORD C. MARTIN

APPENDIX

Relevant Provisions of the Constitution of Texas and Texas Statutes

ARTICLE VI, CONSTITUTION OF TEXAS

§1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§2. Qualified elector; registration; absentee voting

Sec. 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory

nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01. Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.

2. Idots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Art. 5.02. Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

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E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 43, ~~Orig.~~ 46 & 47
Original

STATE OF OREGON,

—v.—

JOHN N. MITCHELL.

~~STATE OF TEXAS,~~

~~—v.—~~

~~JOHN N. MITCHELL.~~

UNITED STATES,

—v.—

STATE OF ARIZONA.

UNITED STATES,

—v.—

STATE OF IDAHO.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
LAWRENCE G. SAGER
156 Fifth Avenue
New York, N. Y. 10010

Attorneys for Amicus Curiae

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In the

Supreme Court of the United States

October Term, 1970

Nos. 43, 44, 46 & 47
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State of Oregon,

—v.—

John N. Mitchell.

State of Texas,

—v.—

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State of Arizona.

United States,

—v.—

State of Idaho.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a national, non-profit organization whose goal is the preservation and strengthening of personal liberty. Its interest in this litigation is two-fold:

First, the ACLU has long recognized, with the Court, that voting is a right "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). It is thus concerned with judicial consideration of federal legislation which is aimed at the redress of unjust and unconstitutional limitations on the franchise.

Second, the careful delineation of the power of Congress to act in areas which involve constitutionally protected rights of individuals is itself of fundamental importance to the interests of the ACLU.

Question Presented

Whether Title III of the Voting Rights Act Amendments of 1970, which confers the right to vote upon eighteen year old citizens, is a valid exercise of the power conferred on Congress by Section 5 of the Fourteenth Amendment.

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* Letters of Consent have been obtained from the Solicitor General of the United States and the Attorneys General of Oregon, Arizona and Idaho and filed with the Clerk of the Court.

Introduction and Summary of Argument

The purpose of this brief is limited. It is addressed only to Title III of the Voting Rights Acts Amendments of 1970—involving extension of the franchise to eighteen year old citizens—although much of what is argued necessarily accrues to the support of Title II as well. Moreover, it is limited to a discussion of the judicial deference which is the due of the congressional judgments which are the constitutional predicate for Title III; it does not include a discussion of the very substantial basis for those judgments. Such discussion is omitted in the belief that the brief of the United States and those of the other *amici* in support of Title III ably adduce the relevant materials.

In arguing for a broad margin of deference to the judgment of Congress here, your *amicus* necessarily draws heavily upon the Court's opinion in *Katzenbach* v. *Morgan*. But special attention is paid to the basis for the *Morgan* decision, which, it is argued, is the special reliance which the Court can and should place on congressional decision-making in the context of issues of federal authority as against the reserved power of the States. In addition, there is discussion of the appropriate limits of the doctrine of the *Morgan* case. It is argued that where congressional decisions are being reviewed on the basis of asserted deprivations of individual liberties secured by the Constitution that *Morgan* is wholly inapplicable. This distinction is offered as the rationale upon which is bottomed the Court's assurance that *Katzenbach* v. *Morgan* will not make possible congressional dilution of Fourteenth Amendment guarantees. Finally, it is argued that Congress' enactment of Title III is an especially appropriate occasion for the application of the principles of *Katzenbach* v. *Morgan*.

I.

Congress is well constituted to resolve issues of federal legislative authority, and great deference is and should be paid to its judgment as regards such issues.

The premise upon which the arguments in this brief are founded was articulated a century and a half ago by Chief Justice John Marshall:

> . . . [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421 (1819).
>
> . . . [W]here the law . . . is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. *Id.* at 423.

While not consistently followed throughout the years since its announcement,[1] it is a proposition which this Court has fully embraced in the past several decades. It has

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[1] See, e.g., *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936); *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935).

become the yardstick against which all challenged congressional exercises of power are measured, whether derivative of the interstate commerce clause, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); of §2 of the Eighteenth Amendment, *James Everard's Breweries* v. *Day*, 265 U.S. 545 (1924); of §2 of the Fifteenth Amendment, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); of §5 of the Fourteenth Amendment, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); or of §2 of the Thirteenth Amendment, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Chief Justice Marshall's classic formulation has significance on two levels. First, it is a reading of the necessary and proper clause, Article I, §8, cl. 18, which eschews any notion that Congress is confined to doing the minimum necessary to discharge its functions, and extols broad congressional license to undertake anything "plainly adapted" to its legitimate ends. Second, it is an announcement of broad deference to Congress on the question of its authority to act as against the reserved powers of the States. This latter principle has been reexpressed in various ways, but while the verbal formulae have varied,[3] their thrust

[3] "In enacting this legislation Congress has affirmed its validity. That determination must be given great weight . . ." *James Everard's Breweries* v. *Day*, *supra*, 265 U.S. at 560.

"[W]here we find that the legislators . . . have a rational basis . . . our investigation is at an end." *Katzenbach* v. *McClung*, *supra*, 379 U.S. at 303-4.

"It is enough that we be able to perceive a basis upon which Congress might predicate a judgment . . ." *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 653, 656.

"Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery." *Jones* v. *Alfred Mayer Co.*, *supra*, 392 U.S. at 440.

has been constant: where Congress has in good faith attempted to exercise its enumerated and incidental powers, great deference is to be paid to its judgment that it is acting within the compass of those powers. Stated differently, a weighty presumption of validity attaches to a congressional enactment as against the charge that it exceeds the bounds of federal authority.

This posture of judicial deference is grounded on the view that Congress itself is best able to strike the balance between the demands of national unity and the claims of reserved state autonomy. Thus, Chief Justice Marshall, at the outset of judicial consideration of congressional power to act under the interstate commerce clause, urged complete reliance on "[t]he wisdom and discretion of Congress, their identity with the people, and influence which their constituents possess at elections." *Gibbons* v. *Ogden*, 9 Wheat. 1, 197 (1824).

Such reliance is well placed, given the great political strength which the states enjoy in the national legislative process. The Senate, of course, constitutes an institutionalized guarantee of state and regional eminence in Congressional deliberations. Moreover, members of the House of Representatives themselves depend for election each term on intra-state constituencies whose political inclinations will amply reflect independent state and local concerns.[3] Professor Wechsler has expressed the consequence of these observations well:

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[3] "A local spirit will infallibly prevail much more in the members of Congress, than a national spirit will prevail in the legislatures of the particular states." Madison, *The Federalist*, No. 46 at 294 (Lodge ed. 1888).

[T]he national political process in the United States —and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states. Far from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse, necessitating the widest support before intrusive measures of importance can receive significant consideration, reacting readily to opposition grounded in resistance within the states. Nor is this tendency effectively denied by pointing to the size or scope of the existing national establishment. However useful it may be to explore possible contractions in specific areas, such evidence points mainly to the magnitude of unavoidable responsibility under the circumstances of our time.

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[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. Wechsler, *The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government*, 54 Col. L. Rev. 543, 558-59 (1954) (footnotes omitted).

This is not to suggest that Congressional treatment of issues of national authority is exclusively political in substance. While it is the political framework within which Congress legislates that insures that themes of state prerogative enjoy prominence, Congressional consideration of problems of federalism has been consistently marked by close attention to the constitutional bases for national action. The review of judicial precedent and expert opinion has become a regular feature of Congressional debate where any substantial question of federal authority is raised.[4]

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[4] Debate on each of the recent civil rights enactments has included extensive discussion of their constitutionality:

Civil Rights Act of 1964, Senate Debate, Cong. Rec. Vol. 110: Sens. Holland and Ribicoff, p. 13059; Sen. Ervin, pp. 13074-77; Sen. Clark, pp. 13079-81; Sens. Byrd and Miller, pp. 13153-74; Sen. Byrd, pp. 13190-214; Sen. Russell, p. 13309; Sen. Humphrey, p. 13310; Sen. Robertson, pp. 13334-76; Sen. McClellan, pp. 13378-415; Sen. Ervin, pp. 13473-89; Sen. Russell, p. 13654; Sen. Ervin, pp. 13709-21; Sen. Robertson, pp. 13881-97; Sen. Douglas, pp. 13922-23.

Civil Rights Act of 1964, House Debate, Cong. Rec. Vol. 110: Rep. Madden, pp. 1511-12; Rep. Celler, pp. 1516-19, 1521-28; Rep. Willis, pp. 1531-35; Rep. Lindsay, pp. 1540-42; Rep. Forrester, pp. 1544-45; Rep. MacGregor, p. 1548; Rep. Lindsay, p. 2269; Rep. Rogers, p. 2277; Rep. Johansen, p. 2279; Rep. Long, p. 2293; Rep. Andrews, p. 2724; Rep. Wyman, pp. 2755-57; Rep. Whitener, pp. 2757-58; Rep. Clausen, pp. 2759-60; Rep. Schwengel, pp. 2760-64.

Voting Rights Act of 1965, Senate Debate, Cong. Rec. Vol. 111: Sen. Andrews, p. 8698; Sen. Ervin, pp. 10555-59; Sen. Talmadge, pp. 10571-74, 10725-26; Sen. Tydings, pp. 10727-29; Sen. Ellender, pp. 10741-65; Sen. Javits, pp. 11014-15; Sen. Kennedy, p. 11015.

Voting Rights Act of 1965, House Debate, Cong. Rec. Vol. 111: Rep. Celler, pp. 15637-38, 15644-52; Rep. Smith, p. 15641; Rep. Willis, pp. 15657-59; Rep. McClory, pp. 15661-64; Rep. Cohelan, p. 15665; Rep. Mathews, pp. 16209-11.

Civil Rights Act of 1968, Senate Debate, Cong. Rec. Vol. 114: Sen. Javits, pp. 536-37; Sen. Talmadge, p. 912; Sen. Hollings, p. 1019; Sen. McClellan, pp. 1157-58; Sen. Stennis, pp. 1281-84;

II.

Congressional exercises of the authority granted in §5 of the Fourteenth Amendment should enjoy the full measure of judicial deference.

Katzenbach v. *Morgan, supra,* is an unequivocal application of Chief Justice Marshall's formulation of congressional authority to congressional undertakings under §5 of the Fourteenth Amendment. Fully embraced are both the broad power to undertake anything "plainly adopted" to the amendment's ends, and the principle of great deference to judgments of Congress rendered in the course of such undertakings. At issue in *Morgan* was the validity of Section 4(e) of the Voting Rights Act of 1965, which prohibited the application of English literacy tests to persons

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Sen. Long, pp. 1288-89, 1292-93; Sen. Ellender, p. 1383; Sens. Hill and Ervin, pp. 1708-15; Sen. Sparkman, pp. 1800-02; Sen. Talmadge, pp. 1795-97; Sens. Fong, Ervin and Ellender, pp. 1990-96; Sen. Kennedy, pp. 2084-85; Sens. Ervin and Holland, p. 2095; Sen. Kennedy, pp. 2268-69.

Civil Rights Act of 1968, House Debate, Cong. Rec. Vol. 113: Rep. McClory, p. 22673; Rep. Hungate, p. 22673; Rep. Whitener, p. 22683; Rep. O'Neal, p. 22690; Rep. Celler, p. 22757; Rep. Waggoner, p. 22763; Sen. Esch, pp. 22772-73; Sen. Buchanan, p. 22775.

Debate on the Voting Rights Act Amendments of 1970 was dominated by constitutional discussion of the provisions' constitutionality. See, e.g.:

Con. Rec. Vol. 116 (daily ed., June 17, 1970): Sen. Sparkman, p. 3475; Sen. Magnuson, p. 3476; Sen. Talmadge, p. 3477; Sen. Ervin, pp. 3477-78; Sen. Kennedy, pp. 3478-79; Sen. Kennedy, pp. 3480-90; Sen. Randolph, pp. 3491-92; Sen. Goldwater, p. 3492; Rep. Ottinger, p. 5656; Rep. Matsunaga, pp. 5639-40; Rep. Celler, p. 5642; Rep. McCulloch, p. 5643; Rep. Anderson, p. 5644; Rep. Albert, pp. 5645-46; Rep. Arends, p. 5647; Rep. Poff, p. 5647; Rep. McGregor, pp. 5647-53; Rep. McCloskey, p. 5654; Rep. Bennett, p. 5654; Rep. Fountain, pp. 5654-55.

educated in Puerto Rico. In sustaining the enactment as an exercise of §5 authority, the Court considered two alternative bases upon which Congress could have validly relied. First, Congress might have concluded that 4(e) would confer "enhanced political power" which would be "helpful in gaining non-discriminatory treatment in public services for the entire Puerto Rican community", and thereby enable "the Puerto Rican minority . . . to obtain 'perfect equality of civil rights and the equal protection of the laws.'" 384 U.S. at 652-53.

Second, Congress might have concluded that, as applied to educated Puerto Ricans, the English literacy requirement was itself an "invidious discrimination." 384 U.S. at 653-56.

As to either basis for congressional action, the Court in *Katzenbach* v. *Morgan* declined to review the legislative judgment. As to both, the Court held that it was for Congress to weigh the conflicting considerations, and as to both, Congress' judgment would prevail so long as the Court "could perceive a basis" for that judgment. 384 U.S. at 653, 655-56.

Katzenbach v. *Morgan* was not a novel pronouncement; its essence was anticipated in one of the first exegeses of the Fourteenth Amendment, rendered some eleven years after that Amendment's ratification:

> It is the power of Congress which has been enlarged [by §5]. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the Amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have

in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional power. *Ex parte Virginia,* 100 U.S. 339, 345-346 (1880).

More contemporaneously, opinions by Justices of the Court had indicated adoption of an expansive view of §5 authority. In *United States* v. *Guest,* 383 U.S. 745 (1966), Mr. Justice Brennan, joined by Chief Justice Warren and Mr. Justice Douglas, observed:

> Viewed in its proper perspective, §5 appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens. No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities. And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided

purpose. 383 U.S. at 784 (concurring and dissenting opinion) (footnotes omitted).

Mr. Justice Black, while dissenting from the judicial conclusion that Virginia's poll tax was violative of the equal protection clause, nevertheless declared that he had "no doubt at all that Congress has the power under §5 to pass legislation to abolish the poll tax if it believes that the poll tax is being used as a device to deny voters equal protection of the laws." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 678 (1966) (dissenting opinion); see also *South Carolina* v. *Katzenbach,* 383 U.S. 301, 355 (1966) (concurring and dissenting opinion of Mr. Justice Black); *Bell* v. *Maryland,* 378 U.S. 226, 326 n. 11 and text (1964) (dissenting opinion of Mr. Justice Black, with whom Mr. Justice Harlan and Mr. Justice White joined).

And, in upholding the Voting Rights Act of 1965, the Court interpreted §2 of the Fifteenth Amendment in a fashion which closely anticipated its opinion in *Katzenbach* v. *Morgan*:

> "The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. *Cf.* our rulings last Term, sustaining Title II of the Civil Rights Act of 1964, in *Heart of Atlanta Motel* v. *United States,* 379 US 241, 258-259, 261-262, 13 L ed 2d 258, 269, 270, 271, 85 S Ct 348; and *Katzen-*

bach v. *McClung*, 379 US 294, 303-304, 13 L ed 2d 290, 297, 298, 85 S Ct 377." *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324.

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"We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under §2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, 'This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 6 L ed 23, 70." *Id.* at 327.

The rationale of *Katzenbach* v. *Morgan* does raise a question, however, which is at the heart of the reluctance on the part of some[5] to embrace it: does the ambit of discretion enjoyed by Congress under the perceivable basis test extend to congressional enactments which fix a less rigorous standard of Fourteenth Amendment guarantees than would otherwise have been adopted by the Court? The Court answered with a simple no: "Congress' power under §5 is limited to adopting measures to enforce the

[5] See, e.g., *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 668 (dissenting opinion of Mr. Justice Harlan); Letter of Professor Gerald Gunther, 116 Cong. Rec. 5649 (daily ed., June 17, 1970); and Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 Supreme Court Review 81.

guarantees of the Amendment; §5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S. at 651, n. 10.

Behind this response is the distinction between challenges to congressional enactments based on the legislative domain reserved to the State, and challenges based on the domain of personal liberties reserved to each individual. The basis for the great deference afforded Congress' judgment as to its power as against the States, it has been argued here, is that it is a body well equipped to resolve issues of federalism. While congressional actions under §5 necessarily include judgments as to the content of §1 of the amendment, they are broadly deferred to only insofar as such judgments form the basis for a finding that Congress had authority to act. Legislation which "diluted" Fourteenth Amendment guarantees would be subject to challenge on grounds not only that it exceeded federal power but that it constituted a deprivation of individual liberties secured by the Constitution, and as regards the latter, a substantially less full measure of deference would be Congress' due.

This would be particularly true where the congressional enactment was the sort of legislative act which has come to be constitutionally disfavored,[6] as, for example, if it clogged the channels of political discussion by limiting speech and association,[7] or injured a politically impotent

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[6] See generally, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938); and notes 7-9, *infra*, and accompanying text.

[7] See, e.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603-4 (1967).

minority,[8] or inhibited participation in the process of election.[9] In such an instance, the deference exposed in *Katzenbach* v. *Morgan* would be singularly inappropriate; reliance on congressional judgment would and should be at its nadir.

Thus, there is nothing at all inconsistent with the pronouncement of this Court in *Katzenbach* v. *Morgan*, vesting great discretion in Congress, and its decision the following Term which struck down as unconstitutionally broad §5(a)(1)(D) of the Subversive Activities Control Act of 1950, 50 U.S.C. §784(a)(1)(d), *United States* v. *Robel*, 389 U.S. 258 (1967). See also, e.g., *Leary* v. *United States*, 395 U.S. 6 (1969); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1962); and *Reid* v. *Covert*, 354 U.S. 1 (1957).

And thus, if Congress were to authorize racially segregated schools, and proffer §5 of the Fourteenth Amendment as the basis for its authority, the appropriate judicial response to such an enactment would be two-fold. On the issue of federal authority, great deference would be paid to the legislature. On the issue of whether Negro students were being deprived of equal protection of the law by the enactment, no such deference would prevail, and the weighty presumption against racial discrimination

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[8] See, e.g., *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 807 (1969); *Harper* v. *Virginia Board of Elections*, *supra*, 383 U.S. at 668.

[9] See discussion at citation of voting rights cases at pp. 18-19, *infra*.

would apply, making the invalidation of the legislation inevitable.[10]

This distinction—between federal authority and individual liberties—was recognized by Chief Justice Marshall when he espoused the principle of generous congressional authority which has come to prevail:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consist with the letter and spirit of the constitution,* are constitutional." *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421 (1819) (emphasis added).

See also, *United States* v. *Robel, supra,* 389 U.S. at 263, n. 20. *Katzenbach* v. *Morgan, supra,* 384 U.S. at 656-58.

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[10] Or, to leave the realm of the hypothetical, consider Title II of the 1968 Omnibus Safe Streets and Crime Control Act, 18 U.S.C. §3501. To the extent that the provisions in that title are in conflict with the standards of due process in the confessions area set out in *Miranda* v. *Arizona,* 384 U.S. 436 (1966), the Court should not grant Congress the broad deference exhibited in the *Morgan* case. On the contrary, the critical nature of personal rights involved should lead the Court to a close consideration of Congress' substitution for the standards in *Miranda.*

III.

Congress' enactment of Title III the Voting Rights Act Amendments of 1970 is an especially compelling occasion for the application of the principles announced in *Katzenbach* v. *Morgan*.

What has been said so far applies generally to §5 exercises of congressional power. It remains to be observed that congressional extension of the franchise to 18 year old citizens is an especially appropriate instance for affording Congress the full margin of deference connoted by the perceivable basis standard. This is so for two reasons.

First, precisely because the question of the 18-year-old vote would be a difficult one for the Court acting alone, it is an especially appropriate one for deference to the judgment of Congress. Congress had, and the Court would have, a persuasive basis for concluding that limiting the franchise to those who were 21 years of age and older unconstitutionally discriminates against younger persons who are well qualified to vote and already bear the burdens of mature citizenship. But a Court which undertook to evaluate the equal protection claim of such young citizens without legislative assistance would be faced with a difficult problem in "line-drawing." Accepting the premise that twenty-one is constitutionally too high a limit, the exact point at which an age limit satisfies the Fourteenth Amendment is the sort of judgment that Courts are poorly equipped to make. Although there are sound reasons for drawing the line at eighteen, that sort of line is far more comfortably drawn by Congress than the Court. While many constitutional interests are well served by principled standards which extend to the full range of applicable

cases, many problems of constitutional dimension necessarily entail essentially *ad hoc* resolutions of competing interests which are insusceptible of principled analysis.[11] Making such determinations is the *forté* of a legislative body. When Congress acts in furtherance of constitutional mandates in areas such as these, its participation should be especially welcome, and its judgment particularly esteemed.

Second, just distribution of the franchise has been recognized to be of paramount importance within our scheme of constitutional government:

> [S]tatutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermine the legitimacy of representative government. *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969).

See also, e.g., *Evans* v. *Cornman*, —— U.S. ——, 26 L. Ed.2d 370 (1970); *City of Phoenix* v. *Kolodziejski*, —— U.S. ——, 26 L. Ed.2d 523 (1970); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). Where a constitutional right of such fundamental importance is involved, the judiciary should be unusually receptive to participation by Congress in the process of rectifying constitutionally infirm inequalities. A finding by Congress that broadening the franchise will further the mandate of the equal protection clause should not lightly be overturned.

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[11] See *Burt*, *supra* note 5, at 112.

Recognition of the constitutional importance of the franchise has led the Court to displace the traditional "reasonable basis" standard of equal protection[12] in the voting rights area. In its stead, the Court has posited the requirement of a "compelling state interest" to justify state imposed restrictions on the franchise. *Kramer* v. *Union Free School District, supra,* 395 U.S. at 627; *Cipriano* v. *City of Houma, supra,* 395 U.S. at 704; *Evans* v. *Cornman, supra,* 26 L. Ed.2d at 374 ("overriding interests"); *City of Phoenix* v. *Kolodziejski, supra,* 26 L. Ed.2d at 528 ("overriding interest"). The same constitutional objective which has generated so stringent a test of judicial review—namely, securing the broadest distribution of the franchise which is compatible with sound government—should lead the Court to give very great weight to congressional determinations which expand the franchise on constitutional grounds. Only a firm judicial conclusion that Congress' judgment is entirely unsupportable should move this Court to find that Congress acted without its §5 authority.

[12] See *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 661 (1911).

CONCLUSION

Recent years have witnessed a dramatic expansion in the effective content of the equal protection clause of the Fourteenth Amendment. Once considered "the last resort of constitutional arguments," *Buck* v. *Bell*, 274 U.S. 200, 208 (1927), it has come to be the basic tool upon which the judiciary has relied in framing a series of crucial constitutional norms of social and political equality. *Katzenbach* v. *Morgan* constituted a decisive recognition of, and provision for, legislative participation in the process of exploring the parameters of the equal protection clause in an egalitarian era.

Title III of the Voting Rights Act Amendments of 1970 is a manifestation of Congress' acceptance of its responsibilities under §5 of the Amendment. It represents a carefully considered, soundly supported judgment of the body. That judgment should enjoy the fullest measure of deference by the Court.

Respectfully submitted,

MELVIN L. WULF
LAWRENCE G. SAGER
156 Fifth Avenue
New York, N. Y. 10010
Attorneys for Amicus Curiae

October 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

No. 44, Original

STATE OF TEXAS, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

MEMORANDUM FOR THE DEFENDANT IN OPPOSITION TO INTERVENTION BY THE NEW YORK CITY BOARD OF ELECTIONS

1. Each of these actions seeks a judgment declaring that the federal statute which lowers the minimum voting age, Title III of the Voting Rights Act, as amended, 84 Stat. 318, is unconstitutional and an injunction prohibiting the Attorney General of the United States from enforcing the provisions of Title III. On September 10, 1970, the New York City

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Board of Elections (hereinafter referred to as the "Board") filed a motion to intervene as defendant in each of these actions.

We submit that the motion to intervene should be denied and that the Board's brief regarding the constitutionality of Title III could properly be treated as the brief of an *amicus curiae* (see Rule 42(4) of the Rules of this Court).

2. The interest which the Board purports to represent in this case is not sufficient to warrant its intervention. Where a political subdivision of a state seeks to intervene in an original action to which the state is already a party, the subdivision has "the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373; see also *Kentucky* v. *Indiana*, 281 U.S. 163. The only interest which the Board seeks to represent here is a citizen interest, the interest of persons between the ages of eighteen and twenty-one in voting.[1] It claims the right to en-

[1] Although the Board alleges a separate interest in the outcome of litigation pending in the District of Columbia courts, that interest necessarily takes its coloration from the interests asserted by the Board in that litigation. The interests asserted by the Board in the District of Columbia litigation are solely those of the citizens subject to its jurisdiction in voting—interests *parens patriae*, and not in any sense proprietary.

force an alleged constitutional right of those persons to vote which it states the federal government will not fully enforce. This is not a "compelling interest in [its] own right," but an "interest in a class with all other citizens and creatures of the state," and hence will not support intervention.

Intervention is especially inappropriate here, where the alleged rights are conferred by federal law, and the Board's claim is necessarily that the federal government will not adequately protect those interests. This Court has long adhered to the principle that it is no part of the "duty or power" of a state or its political subdivisions to enforce its citizens' rights "in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae*." *Massachusetts* v. *Mellon*, 262 U.S. 447, 485–486; *South Carolina* v. *Katzenbach*, 383 U.S. 301; Brief for the Defendant Opposing the Motion For Leave To File Complaint, *Massachusetts* v. *Laird*, No. 42 Original, pp. 9–13. While here the Board ostensibly seeks to defend citizens' federal rights against the states, its claim of right to intervene requires a determination that the federal government is not adequately protecting those rights. It is that determination which this Court's cases properly forbid.

3. To the extent that there is any difference between the legal arguments of the Board and those

of the United States,[2] this can properly be brought to the Court's attention by the Board as *amicus curiae*. Such differences, in themselves, would not warrant intervention even if the interests the Board sought to protect were sufficient. There is no suggestion that the Board has additional factual material to offer which otherwise will not be brought to the Court's attention. Indeed, the record in these cases is limited to legislative materials and other judicially noticeable matters which have equal application to all the issues raised. Nor is there any question here of the Board's need to intervene in order to preserve the possibility of seeking appellate review of any decision this Court might render. The preservation of legal issues which may not be dealt with fully by the parties, on the other hand, is the primary function of an *amicus curiae* brief. See Rule 42(3) of the rules of this Court. The

[2] The Board's motion to intervene was prepared prior to the filing of the Brief for the United States in *United States* v. *Arizona* and *United States* v. *Idaho*, Nos. 46 and 47, Original. That brief sets forth the position of the United States with respect to the constitutionality of Title III, see pp. 23–39 and pp. 63–76. The Board argues that, even apart from any action by Congress, the Court should hold that denial of the vote to otherwise qualified persons between 18 and 21 years of age violates the Equal Protection Clause.

filing of such a brief adequately protects the interests the Board asserts.[3]

CONCLUSION

For the above reasons, we urge the Court to deny the motion to intervene and to treat the Board's brief on the merits as the brief of an *amicus curiae*.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

SEPTEMBER 1970.

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[3] Unlike counsel for parties, counsel for an *amicus curiae* has no right to take part in oral argument. See Rule 44(7) of the rules of this Court. In our view, the interest of the Board in this litigation is not materially different from that of other groups which support the validity of Title III. See, *e.g.*, the Brief submitted by citizens for lowering the voting age and others, as *Amicus Curiae*, in *Oregon* v. *Mitchell* and *United States* v. *Arizona*, Nos. 43 and 46, Original, respectively. All such groups seeking participation in oral argument should be placed on equal footing.

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P.L. 91–285, Title III, 84 Stat. 318	6, 7, 9, 20, 21, 75
42 U.S.C. 1981	11
Constitution of Oregon:	
Article II, Sec. 2	6
Constitution of Texas:	
Article VI, Secs. 1 and 2	6
Texas Election Code, Articles 5.01 and 5.02	6

Miscellaneous:

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to Vote, and to Enforce Against the States the "Privi-
Congress, 1965 Sup. Ct. Rev. 33.....

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

ANSWER

In answer to the Complaint, Defendant John N. Mitchell states as follows:

I. Admits that this Court has jurisdiction.

II. Admits the allegations of paragraph II.

III. Admits the allegations of paragraph III.

IV. To the extent that paragraph IV contains allegations of fact, those allegations are admitted.

V. Admits the allegations of the first sentence of paragraph V. The second sentence of paragraph V contains conclusions of law to which no response is required.

VI. Admits that the plaintiff has standing as a sovereign to bring this action, but not as *parens patriae*.

VII. Paragraph VII contains conclusions of law to which no answer is required.

VIII. Lacks information sufficient to form a belief as to the truth of the allegation that implementation of Title III of the Voting Rights Act as amended would entail considerable expense for the plaintiff, but otherwise admits the allegations of paragraph VIII.

IX. Admits the allegations of paragraph IX.

X. Lacks information sufficient to form a belief as to the truth of the allegations of paragraph X.

Defendant prays that the Court deny the relief sought by the plaintiff and enter judgment sustaining the constitutionality of Title III of the Voting Rights Act as amended.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

OCTOBER 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 44, Original

STATE OF TEXAS, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

ANSWER

In answer to the Complaint, Defendant John N. Mitchell states as follows:

I. Admits that this Court has jurisdiction.

II. Admits the allegations of paragraph II.

III. Admits that the plaintiff has adopted provisions in its Constitution and statutes prescribing election procedures for local, state and national elections; the remainder of the first sentence of paragraph III consists of conclusions of law to which no response is required. Admits the allegations of the second sentence of paragraph III.

IV. Admits the allegations of paragraph IV.

V. Admits the allegations of the first sentence of paragraph V. Admits that, with respect to all elections held after December 31, 1970, Title III of the Voting Rights Act as amended prohibits the plaintiff from

denying the right to vote, on account of age, to persons aged 18 and older.

VI. Paragraph VI consists of conclusions of law to which no response is required.

VII. Paragraph VII consists of conclusions of law to which no response is required.

VIII. Admits that the plaintiff and 45 other states have laws prescribing 21 as the minimum age for voting; the remainder of paragraph VIII consists of conclusions of law to which no response is required.

IX. Admits that Section 303(a) of Title III authorizes the Attorney General of the United States to institute actions to enforce the provisions of Title III, and that he will do so as required.

X. Admits that, with respect to all elections held after December 31, 1970, Title III prohibits the plaintiff from denying the right to vote, on account of age, to persons aged 18 or older and admits that this controversy is ripe for adjudication.

XI. Admits that the plaintiff is entitled to invoke the jurisdiction of this Court; the remainder of paragraph XI consists of conclusions of law to which no response is required.

Defendant prays that the Court deny the relief sought by the plaintiff and enter judgment sustaining the constitutionality of Title III of the Voting Rights Act as amended.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

OCTOBER 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

No. 44, Original

STATE OF TEXAS, PLAINTIFF

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

BRIEF FOR THE DEFENDANT

JURISDICTION

Motions for leave to file a complaint in each of these actions, together with related documents, were filed on August 3, 1970. Each is an action between a state and a citizen of another state.[1] The original jurisdiction of this Court is invoked under Article III, Section 2, Clauses 1 and 2 of the Constitution and 28 U.S.C. 1251(b)(3). Leave to file each complaint was granted by the Court in an order of October 6, 1970.

[1] Attorney General Mitchell is a citizen of New York.

QUESTION PRESENTED

Whether Title III of the Voting Rights Act Amendments of 1970 is constitutional insofar as it prohibits the states from denying the right to vote to any otherwise qualified person 18 years of age or older in any election.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title III of the Voting Rights Act Amendments of 1970, P.L. 91–285, 84 Stat. 318, is set forth in Appendix B, *infra*, pp. 75–77.

The pertinent provisions of Article II, Section 2 of the Oregon Constitution, Article VI, Sections 1 and 2 of the Texas Constitution and Articles 5.01 and 5.02 of the Texas Election Code (Vernon's) are set forth in Appendix C, *infra*, pp. 79–80.

STATEMENT

These actions, essentially identical in nature, challenge the constitutionality of the federal statute which reduces the voting age to 18, Title III of the Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 318. Each of the plaintiffs seek a decree enjoining the enforcement of Title III as being inconsistent with its own state constitutional and statutory provisions setting the minimum voting age at 21.

Title III prohibits a denial of the right to vote to any citizen of the United States 18 years of age or older who is otherwise qualified to vote in any state or political subdivision (Section 302). The provision is to take effect with respect to any election or primary held on or after January 1, 1971 (Section 305), and will result in lowering the voting age from 21 to 18 in forty-six states and the District of Columbia, and from 20 to 18 in the State of Hawaii. The States of Georgia, Kentucky and Alaska[1] will not be affected by this title since 18-year olds there already have the right to vote. It has been estimated that close to 10 million persons who would be eligible to vote under this title are presently disfranchised because of age alone. See Hearings on Amendments to the Voting Rights Act before the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess., p. 328; 116 Cong. Rec. 3060 (daily ed., March 5, 1970; Sen. Kennedy).

[1] Alaskan voters approved a referendum reducing the voting age to 18 in an election held August 25, 1970.

ARGUMENT

I

INTRODUCTION AND SUMMARY

These original actions call into question both the scope of Congress' power under the Enforcement Clause of the Fourteenth Amendment and the standard of rationality by which Congress must measure state voting qualifications in connection with the exercise of that power. Specifically, the issue raised is whether Congress has the power under the Constitution to prohibit a denial of the vote to citizens between the ages of 18 and 21 on finding that there is today neither a sufficient basis for differentiating between these citizens and those who are 21 and over, nor any "compelling state interest" which would warrant excluding this age group from the franchise.

The identical question is before this Court in the original actions instituted by the United States against the States of Arizona and Idaho, respectively, Nos. 46 and 47 Original, which have been set down for argument at the same time as the present cases. In the Brief for the United States filed in those actions,[2] the various contentions raised here by the plaintiffs (and by certain other states, as *amicus curiae*) have been thoroughly analyzed and answered. The defendant respectfully refers the Court to pp. 23–39 and 63–76 of that brief for a full statement of the reasons for defendant's opposition to the instant complaints.

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[2] Hereafter references to this brief will appear as "Gov't Ariz. Br." A copy of this brief has been furnished to counsel for plaintiff in each of these actions.

It is helpful here to reiterate that while Texas and Oregon are concerned only with the matter of age qualifications, the constitutional issues raised may equally control on the issues of residence and literacy qualifications. Section 2 of the Fourteenth Amendment, on which Texas principally relies, lists a number of voting qualifications: citizenship, age, sex and inhabitance. No mention is made of literacy, nor of duration of residence. While we believe that the list is descriptive of conditions prevalent in the 1960's, rather than prescriptive, Gov't Ariz. Br. 74–75, if it has any greater effect that is significant for the other issues in these cases as well. And, as the quotations from this Court's cases presented in Texas' brief themselves show, Tex. Br. at 11–13, this Court has never referred to age qualifications for voting without in the same breath linking them with such matters as residence and literacy. Gov't Ariz. Br. 63–64. Seductive as the notion may appear, one may not deal with Title III as if, because it concerns age, it presents matters separate and apart from those which arise under the remainder of the statute.

There remains only the need to speak briefly to the threshold question presented by these actions—*i.e.*, the role of the judiciary in reviewing a congressional enactment under Section 5 of the Fourteenth Amendment. In our view, the importance of this question makes it deserving of separate comment here, even at the risk of some repetition. It is, then, to this fundamental consideration that we now turn.

II

TITLE III IS APPROPRIATE LEGISLATION UNDER THE FIFTH SECTION OF THE FOURTEENTH AMENDMENT

1. The Constitution of the United States makes reference to voting qualifications in seven separate places.[4] While these provisions have long been recognized as acknowledging the states' "broad powers to determine the conditions under which the right of suffrage may be exercised" (*Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 50; see *Minor* v. *Happersett*, 21 Wall. 162; *Pope* v. *Williams*, 193 U.S. 621), they have never been read as permitting unchecked power to fix voting eligibility. The authority vested in the states in this area, as in other areas of primary state responsibility, may be exercised only within the limitations prescribed by the Federal Constitution.[5] As this

[4] U.S. Const. Art. 1, Sec. 2, Cl. 1; Art. 1, Sec. 4, Cl. 1; Fourteenth, Fifteenth, Seventeenth, Nineteenth and Twenty-fourth Amendments.

[5] Article I, Section 4 of the Constitution grants states the power to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," but, in the immediately following words, it empowers the Congress to "make or alter such Regulations." See *United States* v. *Classic*, 313 U.S. 299; *Ex Parte Yarbrough*, 110 U.S. 651; *United States* v. *Mosley*, 238 U.S. 383; *Ex Parte Siebold*, 100 U.S. 371. A further restraint is the Twenty-fourth Amendment. See *Harman* v. *Forssenius*, 380 U.S. 528. Also, there are constitutional restrictions on state elections. The Nineteenth Amendment forbids disqualification on account of sex. The Fifteenth Amendment bans voting standards that discriminate on account of race or color. And the Fourteenth Amendment prohibits requirements inconsistent with equal protection of the laws (*infra*, p. 11).

Court stated more than three-quarters of a century ago (*Ex Parte Yarbrough*, 110 U.S. 651, 664):

> the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the State. * * *

It is now settled that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Evans* v. *Cornman*, 398 U.S. 419, 422; see also *Carrington* v. *Rash*, 380 U.S. 89; *Louisiana* v. *United States*, 380 U.S. 145; *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 668. Since state voting qualifications are thus within the purview of Section 1 of the Amendment, Congress is specifically authorized under Section 5 to "enforce" the prohibition by appropriate legislation.[6] See, *e.g.*, 42 U.S.C. 1981; *Pollock* v. *Williams*, 322 U.S. 4; *Buchanan* v. *Warley*, 245 U.S. 60; *Fay* v. *New York*, 332 U.S. 261; *Monroe* v. *Pape*, 365 U.S. 167.

This implementing provision, no less than the enforcement clauses of the Thirteenth and Fifteenth Amendments,[7] has long been recognized by the Court

[6] See Gov't Ariz. Br., pp. 24–27. See also Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33, 37–78.

[7] The Thirteenth, Fourteenth and Fifteenth Amendments each specifically grants Congress the power to enforce its provisions by appropriate legislation. Thirteenth Amendment, Section 2, Fourteenth Amendment, Section 5, Fifteenth Amendment, Section 2. In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326–327, the Court unanimously held that such grant of power under "§ 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the

as an enlargement of Congress' power—"[s]ome legislation is contemplated to make the amendments fully effective." *Ex Parte Virginia*, 100 U.S. 339, 345.[8] The view that this enlarged power is conditioned on an independent judicial determination that the state law is unconstitutional was laid to rest in *Katzenbach* v. *Morgan*, 384 U.S. 641, 648: "Neither the language nor history of § 5 supports such a construction."[9] Rather, the clear intent was to make Congress' authority under the Enforcement Clause coextensive with that which it enjoys under the Necessary and Proper Clause of the Constitution. Art 1, Sec. 8, para. 18; see 384 U.S. at 648–649; see also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326–327.[10] Thus, "it is primarily for Con-

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reserved powers of the States," citing *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. See Gov't Ariz. Br., pp. 24–26. Similarly, with respect to Section 2 of the Thirteenth Amendment, the Court stated in *Jones* v. *Mayer Co.*, 392 U.S. 409, 439, that the enforcement clause "clothed 'Congress with the power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*,'" (Emphasis in original).

[8] See Gov't Ariz. Br. p. 24; and cases there cited.

[9] See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., p. 2459 (Cong. Stevens), p. 2961 (Sen. Poland), pp. 2765–2768 (Sen. Howard). And see *Katzenbach* v. *Morgan*, 384 U.S. at 648 nn. 7 and 8. As noted by this Court in *Ex Parte Virginia*, 100 U.S. at 345, with respect to the enforcement clauses: "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged." See *Amicus* Brief of Youth Franchise Coalition and others, pp. 24–25; Brief of *Amicus* New York City Board of Elections, pp. 14–17.

[10] See Gov't Ariz. Br. pp. 24–26, and authorities there cited.

gress to consider and decide the fact of the danger and to meet it." *Stafford* v. *Wallace*, 258 U.S. 495, 521; cf. *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1, 32; *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37. Plainly, in this regard, the powers of the legislative branch are somewhat broader than those of the federal judiciary. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241. As this Court observed in *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304:

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. * * *

Just as Congress may give lead to the courts under the commerce clause in prohibiting certain kinds of state regulation (*Katzenbach* v. *McClung*, 379 U.S. 294), so, too, it is wholly proper for Congress to take the initiative in marking the limits of permissible state action under the Fourteenth Amendment with respect to voting qualifications. See *Katzenbach* v. *Morgan*, *supra*; cf. *South Carolina* v. *Katzenbach*, *supra*; *Fay* v. *New York*, *supra*, 332 U.S. at 282–284; and see Gov't Ariz. Br., pp. 35–37. Moreover, once the legislature has spoken, it is not for the judiciary to superimpose an independent evaluation. See *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304. Rather, "[i]t is enough that [the Court] be able to perceive a basis

upon which the Congress might resolve the conflict as it did." *Katzenbach* v. *Morgan*, 384 U.S. at 653.

> It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations * * *. It is not for [this Court] to review the congressional resolution of the factors. * * * [*Ibid.*]

Such is the scope of judicial review in the instant case.

2. The plaintiff states' efforts to distinguish *Morgan*, like those which appear in the legislative history of Title III, rely heavily on the special facts of that case. There, illiterate Puerto Ricans were the excluded class. That class, it is argued, is self-identifying and perhaps a likely target of political reprisals or disadvantage; classifications according to ethnic background, like those according to race, are constitutionally suspect and, indeed, there is a special federal obligation of protection toward Puerto Ricans in particular. The 18-to-20-year-old group, it is argued, fits none of these particulars. Their exclusion from the vote is said not to be related to any established area of constitutional concern; nor, it is argued, do such persons constitute a clearly identified group against whom specific political reprisals are likely to be visited. Assuming they have not died in the interim, otherwise qualified 18-year olds automatically do get the vote by reaching the age of 21.

While the proposed distinction has apparent force, we believe it should be rejected. At the outset we remark that many of these supposed distinguishing factors were ignored by the Court in *Morgan*. Although

government counsel devoted much of its presentation to the argument that the statute could be sustained on the basis of Congress' special protective obligations regarding Puerto Ricans, that rationale is unmentioned in the Court's opinion. Further, as we develop in our Arizona brief, pp. 27–28, *Morgan* is not dependent on the notion that the class affected is one particularly likely to be the subject of improper, general discrimination. While part of the Court's discussion might be so read, 384 U.S. at 652–653, the decision is also based squarely on Congress' power to identify and eliminate "invidious discrimination in establishing voter qualifications." 384 U.S. at 654. In this regard, we also refer the Court to the persuasive reading of *Morgan* made in the recent decision of a three-judge district court in the District of Columbia, *Christopher* v. *Mitchell,* Civ. No. 1862–70, decided October 2, 1970, and reprinted as an appendix, *infra,* p. 23 ff., at pp. 35–44.

This Court has already rejected the notion that the protections of the Equal Protection Clause are limited to self-identifying groups likely to be the object of specific political reprisal, and against which it would be irrational or invidious to legislate directly. ~~For the~~ It has held, clearly enough, that voting itself is a specially protected interest, from which no person may be excluded by state classifications unless those classifications are supported by a "compelling state interest." *Kramer* v. *Union Free School District, supra.*[11] There

[11] That this is the appropriate standard by which the Equal Protection Clause is to be applied in the area of voting qualifications has been fully analyzed in Gov't Ariz. Br. pp. 29–39.

was no claim, for example, in *Evans* v. *Cornman*, *supra*, that the residents of federal enclaves faced political reprisals or general discrimination because of their inability to vote, or which would be remedied by extending the vote to them. The issue in that case was the propriety of the classification which excluded them; this Court unanimously found that classification unsupported by sufficiently compelling state interests, and therefore held it invalid. Access to the vote, in itself, is a constitutional concern that this Court has voiced. Congressional action implementing such access thus presents no greater threat to the judicial function or to the constitutional structure of government generally than did the opinion in *Morgan*.

Moreover, even assuming that there ought to be some identifiable group, subject to improper discrimination or political reprisal, Congress properly made the judgment that such a group is present here. Whether or not the class of 18-to-20-year olds, in itself, constitutes a discrete entity, it is evident that there is a class of young adults, including the members of that group, against whom voices are frequently being raised in today's political arena. If, as Congress found, 18-to-20-year olds are otherwise qualified to vote and no compelling state interest supports denying them the vote, it is no better argument to say to them that they must wait and let their elders represent them than it would be to inform an excluded racial minority that the eldest 50% of its number will alone be permitted to vote. Contemporary youth over the age of 18 are as much en-

titled to represent their own interests as members of the electorate as any other class of voters. To deny these young adults this privilege at the very least causes them to be underrepresented relative to other classes of the voting population; it is self-evident that as they become older, and thus qualify for the vote, youth will experience changes in perspective which make them increasingly unrepresentative of the interests of the class they have outgrown.[12]

In sum, the issue remains as stated in our Arizona brief—whether Congress properly found, or had a basis for finding, that state laws excluding 18- 19- and 20-year olds from the franchise are unsupported by a compelling state interest and violate the equal protection concept. That Congress is empowered to make such an assessment has been amply demonstrated (*supra*, pp. 11-13; and see Gov't Ariz. Br. pp. 73–74). The fact that the fixing of one rather than another age qualification unavoidably embodies a certain element of arbitrariness does not immunize the particular age chosen from the Fourteenth Amendment's requirements—it, too, is subject to congressional scrutiny (see Gov't Ariz. Br. pp. 35–37). Disfranchised youth, as much as the enclave residents of *Evans* v. *Corman*, are "locked into [a] self-perpetuating status of exclusion from the electoral process." *Kramer* v. *Union Free School District*, 395

[12] Assuming youth have the necessary maturity, any special perspective they may have affords no proper basis for fencing them out from the franchise. *Carrington* v. *Rash*, *supra*, 380 U.S. at 94; Gov't Ariz. Br. at 35 n. 24.

U.S. 621, 640 (Stewart, Black and Harlan, JJ., dissenting); and see Gov't Ariz. Br., pp. 33–34. Nor is it relevant that most state legislatures earlier voiced a preference for a higher age. (Texas Br. p. 14.) Since Congress has determined for itself a need to legislate in this specific area under Section 5, it remains only for the Court to examine the facts and testimony on which Congress rested its conclusion to ascertain whether it can "perceive a basis" for the congressional enactment.

The legislative history of Title III has already been thoroughly documented for the Court,[12] and it serves no purpose to detail the findings yet another time. In sum, the record reflects, much more so than in *Katzenbach* v. *Morgan, supra,* a full congressional analysis of the factors relevant to the constitutional question, careful evaluation of conflicting interests, and virtual unanimity on the underlying issue of the readiness of 18 to 20-year olds for the vote. It amply supports Congress' conclusion that denial of the franchise to this age group is no longer warranted by any "compelling state interest."[13] On the basis of the evidence before it, Congress had ample authority to find the exclusion to be a denial of equal protection subject to remedial legislation under Section 5 of the Fourteenth Amendment. *Christopher* v. *Mitchell,* App. A *infra,* pp. 54–55.[14]

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[12] See Gov't Ariz. Br., pp. 66–73; *Amicus* Brief of Youth Franchise Coalition and others, pp. 7–23; *amicus* Brief of New York City Board of Elections, pp. 24–27, 29–31, 36–38.

[14] See *Amicus* Brief of Youth Franchise Coalition and others, pp. 32–35; *Amicus* Brief of the American Civil Liberties Union, pp. 17–19.

3. This is not to say that Congress can supplant the states' prerogative in setting voting qualifications. Except as circumscribed by the Constitution (*supra*, n. 5), it still remains entirely the responsibility of the states to initiate legislation in this area. But where that legislation excludes otherwise qualified citizens from the vote on the basis of a distinction which cannot be sustained by any compelling state interest, Congress, on so finding, has constitutional power to impose restrictions which enforce the Equal Protection Clause and the Fifteenth Amendment (*supra*, pp. 11–14). See Gov't Ariz. Br., pp. 37–39; and see Alfange, *Congressional Power and Constitutional Limitations*, 18 J. Pub. L. 103, 126–127 (1969). That it chose in this instance to proceed by statute rather than constitutional amendment reflects no more than a congressional recognition of this Court's most recent pronouncements that Congress was, indeed, invested with the power to do so.[15] See *Katzenbach* v. *Morgan*, *supra*; *South Carolina* v. *Katzenbach* *supra*.[16] We thus find no merit in the contention that the Fifteenth, Nineteenth and Twenty-fourth Amendments dictate a different course.

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[15] See *Amicus* Brief of Youth Franchise Coalition, pp. 21–23.

[16] Although earlier decisions foreshadowed the result (see *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Breedlove* v. *Suttles*, 302 U.S. 277; *Schnell* v. *Davis*, 336 U.S. 933, affirming *per curiam* 81 F. Supp. 872, 876 (S.D. Ala.); *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45; *Reynolds* v. *Sims*, 377 U.S. 533, 554), it was not made explicit until this Court's decision in *Carrington* v. *Rash*, 380 U.S. 89, and *Louisiana* v. *United States*, 380 U.S. 145, that the validity of

The Equal Protection Clause, under which Congress acted here, is, as a recognized restraint on state voting qualifications, sufficient constitutional basis for restricting the voting age provisions by statute. See *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51; see also Gov't Ariz. Br., pp. 73–74.

Nor does Section 2 of the Fourteenth Amendment foreclose the judgment Congress has made. In his concurring opinion in the recent district court decision in *Christopher* v. *Mitchell*, App. A, *infra*, pp. 55, 61–73, Judge MacKinnon has set out the history of that provision to make clear that it is too ambiguous to sustain such an argument. The most that can be said of it is that it was intended—although it has never been used—to provide a remedy against exclusion of the newly freed slaves from the vote. That remedy was wholly internal and administrative, and the description of voting qualifications it contains was at best descriptive of the existing qualifications commonly required of voters. It was not thought to have, and should not now be given, a prescriptive effect that might freeze state as well as federal standards to the limited qualifications it mentions. Gov't Ariz. Br. 74–75; Van Alstyne, *op. cit. supra* n. 6.

We emphasize that Title IH of the Voting Rights Act Amendments does not require a certain level of

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State-imposed voting qualifications could be challenged not only under the Suffrage Amendments, but under the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well.

age for voting;"[17] nor does it in any way restrict the franchise. Plainly, Congress has no such power under the Equal Protection Clause. See *Katzenbach* v. *Morgan, supra*, 384 U.S. at 651–652 n. 10. What Title III does do, however, and properly so, is to set a minimum standard which is consistent with the congressional findings on which the statute is based and within which the states are free to legislate. See Gov't Ariz. Br., pp. 36–39. Thus, it conforms with both the letter and spirit of the Constitution and is "appropriate legislation" to enforce the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons given, and in the absence of any material issue of fact, this Court should enter judgment in favor of the defendant, sustaining the validity of Title III of the Voting Rights Act Amendments of 1970, and should deny the relief requested in the complaints.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.
ERWIN N. GRISWOLD,
Solicitor General.
JERRS LEONARD,
Assistant Attorney General.
PETER L. STRAUSS,
WM. BRADFORD REYNOLDS,
Assistants to the Solicitor General.

OCTOBER 1970.

[17] The fact that Congress drew the line at 18, rather than at some lower age, does not preclude the states from choosing to adopt the ages of 17 or 16, for example. And see Gov't Ariz. Br., p. 37 n. 27, p. 73 n. 78.

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 1862–70

FREDERICK J. CHRISTOPHER, JR., BENTON COLE, SALVATORE LO DICO, GEORGE C. SMITH, and RAYMOND J. MEREDITH, PLAINTIFFS

v.

JOHN N. MITCHELL, as Attorney General of the United States, and the NEW YORK CITY BOARD OF ELECTIONS, consisting of James M. Power, Thomas Mallee, Maurice J. O'Rourke, and J. J. Duberstein, DEFENDANTS

Filed October 2, 1970, Robert M. Stearns, Clerk

Mr. Alfred Avins for plaintiffs.

Mr. David Norman, Deputy Assistant Attorney General, with whom *Messrs. Thomas A. Flannery,* United States Attorney, *Jerris Leonard,* Assistant Attorney General, *David B. Marblestone* and *Jeremy I. Schwartz,* Attorneys, Department of Justice, were on brief, for defendant John N. Mitchell. *Messrs. Marblestone* and *Peter L. Strauss* also entered appearances for Mr. Mitchell.

Mr. Norman Redlich, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Mr. J. Lee Rankin,* Corporation Counsel for the City of New York, was on brief, for defendant New York City Board of Elections.

Senator Edward M. Kennedy, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice,* by special leave of court, argued this cause as *amicus curiae* in support of defendants' position, on behalf of Youth Franchise Coalition and others.

Amicus curiae briefs in support of defendants' position were filed by *Messrs. William A. Dobrovir* and *H. David Rosenbloom* for Youth Franchise Coalition and others, *Joseph L. Rauh, Jr.* for Americans for Democratic Action, *Nathaniel R. Jones, Clarence Mitchell,* and *J. Frances Pohlhaus* for the National Association for the Advancement of Colored People, *Melvin L. Wulf* and *Lawrence G. Sager* for the American Civil Liberties Union, *David Rubin* for the National Education Association, and *Stephen I. Schlossberg* and *John A. Fillion* for International Union, United Automobile Workers; by *Messrs. Leonard B. Sand* and *Barry I. Fredericks* for the WMCA Vote at 18 Club; by *Mr. John R. Cosgrove* for Citizens for Lowering the Voting Age—California and others; and by *Messrs. Nathaniel R. Jones, Clarence Mitchell* and *J. Francis Pohlhaus* for the Department of Armed Services and Veterans' Affairs of the NAACP.

Prof. William W. Van Alstyne, of the bar of the Supreme Court of California, *pro hac vice,* by special leave of court, filed a brief and argued this cause as *amicus curiae* (appointed by the court).*

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*Prof. Van Alstyne of Duke University Law School was appointed by this court *sua sponte*, not to support either of the parties' positions, but to assist the court in its deliberations. We are very grateful to him for his scholarly and helpful response.

Before BAZELON, Chief Judge, MACKINNON, Circuit Judge, and BRYANT, District Judge

OPINIONS

BAZELON, *Chief Judge:* At issue in this case are the Voting Rights Act Amendments of 1970.[1] These provisions are reprinted in Appendix A of this opinion, but they may be briefly stated. First, the new law extends for five years the operation of section 4(a) of the Voting Rights Act of 1965,[2] the primary effect of which provision was to suspend the use of literacy tests in six southern states and part of a seventh state.[3] Second, it provides that the 50 per cent overage formula of section 4(b),[4] which took as its base the 1964 presidential election, may also be computed from the 1968 presidential election figures. In addition, the 1970 Amendments add two new titles to the Voting Rights Act. Title II contains provisions which (1) suspend all voting "tests and devices" [5] in states

[1] Public Law 91-285, 91st Cong., 2d Sess., 84 Stat. 314, signed by the President on June 22, 1970.

[2] 42 U.S.C. § 1973b(a).

[3] Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and a number of counties in North Carolina. *See Hearings on H.R. 4249, etc., Before Subcom. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 92-93 (1969) [hereinafter cited as *House Hearings*].

[4] 42 U.S.C. § 1973b(b).

[5] Section 201(b):

"As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove

not already covered by the Voting Rights Act as amended, and (2) abolish state durational residency requirements in presidential elections. Title III prohibits states from denying the vote on the basis of age to citizens eighteen years of age or older.[6]

Plaintiffs are citizens of New York State, over twenty-one years of age, able to read and write the English language, and resident in their respective counties for more than three months. They are qualified to vote under the laws of the State[7] and are duly registered. They claim that enforcement of the Voting Rights Act as amended will dilute their votes in forthcoming elections. Accordingly, they seek a declaratory judgment that the Amendments are unconstitutional and an injunction restraining defendants—the Attorney General of the United States and the New York City Board of Elections—from enforcing the 1970 Amendments. Because plaintiffs seek to enjoin the enforce-

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his qualifications by the voucher of registered voters or members of any other class."

This section merely repeats the definition of "test or device" that appears in the original Voting Rights Act of 1965. 42 U.S.C. § 1973b(c).

[6] Title III does not go into effect until January 1, 1971. Section 305. The rest of the amendments, however, went into effect immediately.

[7] N.Y. CONST., art. II, § 1, provides in pertinent part:

"Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election. . . . [N]o person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English."

ment of an Act of Congress, a statutory three-judge court was convened. 28 U.S.C. §§ 2282, 2284. Defendants moved for summary judgment on the merits with respect to plaintiffs' challenges to Titles II and III; they moved to dismiss those counts challenging Title I or, in the alternative, for summary judgment on the merits.[8] Plaintiffs cross-moved for summary judgment on all counts.

We find that Congress did have the power to enact the challenged provisions of the Voting Rights Act Amendments of 1970 and therefore grant summary judgment for the defendants.

I. TITLE I—THE AMENDMENTS TO SECTION 4 OF THE VOTING RIGHTS ACT OF 1965

Sections 4(a) and 4(b) of the Voting Rights Act of 1965[9] suspended the use of any "test or device"[10] in any state or political subdivision

> which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.[11]

The suspension was not absolute; a state or subdivision could escape it by proving in court

> that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of

[8] Defendants do not deny that plaintiffs state causes of action and have the requisite standing in challenging Titles II and III, and we see no need to discuss the matter *sua sponte*.

[9] 42 U.S.C. §§ 1973b(a) & (b).

[10] *See* note 5 *supra*.

[11] 42 U.S.C. § 1973b(b).

denying or abridging the right to vote on account of race or color . . . .[12]

These provisions were found to be an appropriate exercise of congressional power under section 2 of the Fifteenth Amendment in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

The 1970 Amendments extend the provisions of the 1965 Act for five years.[13] In addition, they provide that the 1968 presidential election will now be taken as the base for the coverage formula, as well as the 1964 election. Therefore, if in any state or subdivision less than 50 per cent of the persons of voting age residing therein were registered on November 1, 1968, or if less than 50 per cent of such persons voted in the 1968 presidential election, then the section 4(a) prohibition of literacy tests and other devices shall apply.

Standing and ripeness

Plaintiffs live in counties in New York State which were not reached by application of the old coverage formula. Three of them live in New York County, which they allege will be covered if the 50 per cent calculation is based upon voting and registration figures for the 1968 presidential election. Defendants reply that the Director of the Census has not yet made the determination required by section 4(b) of the Voting Rights Act as amended, because he is waiting for the 1970 census figures on New York to come in.[14] Therefore, defendants assert, plaintiffs' attack on Title I of the 1970 Amendments is premature.

[12] *Id.* § 1973b(a).

[13] The effect of the 1970 Amendments on sections 4 and 5 of the Voting Rights Act of 1965 is shown in Appendix B *infra*.

[14] Letter to Mr. Jerris Leonard of the Justice Department from Mr. George H. Brown, Director, Bureau of the Census, July 27, 1970:

"This will acknowledge your letter of July 24 concerning

The issue raised is a troublesome one, but after careful reflection we have concluded that plaintiffs' challege to the amendments to section 4 of the Voting Rights Act of 1965 does satisfy the requirements of standing and ripeness. First, it is clear that there is a danger that section 4(a) as amended will apply to New York County, whenever the determination is made by the Director of the Census. Plaintiffs' assertions to this effect were uncontested by defendants. This danger seems to us substantial enough to satisfy the conditions of standing in the narrow sense.[15]

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determinations to be made by us under the Voting Rights Act Amendments of 1970, Public Law 91-285.

"In making these determinations, we expect to follow the same general rules as used by us earlier in connection with the 1965 Act. Consequently, we believe the determinations under the Amendments need to wait for the results of the 1970 census. These will become available to us on a flow basis starting next month with the largest states, such as California and New York, becoming available toward the end of the year. The 1970 census results will give us a basis for making firm estimates of the population of voting age as of November 1968 required as denominators for determining the percent voting in the 1968 elections.

"Unless determinations of the Voting Rights Amendments can be made on the basis of the 1970 census (interpolated back to November 1968), it would be necessary to use data extrapolated for the eight-year period since the 1960 census. This latter procedure would be self-defeating since in many instances we could not in good conscience make the determinations without the benefit of new benchmark data. New benchmark data will be uniformly provided by the 1970 census results."

[15] *See* Golden v. Zwickler, 394 U.S. 103 (1969); Poe v. Ullman, 367 U.S. 497 (1961). The flat ban on literacy tests—section 201 of Title II—which we uphold in this opinion (pp. 15-16 *infra*) might seem to preclude a finding that there was a threat of actual *harm* to plaintiffs, since that section will ban New York County's literacy test even if the county does not fall within the 50 per cent coverage formula. While true, this observation blurs the fact that section 4 as amended and section

Second, it is very possible that the determination by the Census Director will be made before the approaching election in November. Not only may the 1970 census figures for New York be available before the election, but the Census Director may decide that he has a legal duty to make a determination on the best figures available to him before the election is held.[15] Third, to the extent that the Census Director delays as long as possible before making a determination prior to the election, judicial review of the

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201 are complementary; the coverage of the one is defined in terms of the coverage of the other. *See* note 53 *supra*. To the extent that there is doubt whether the county falls within the coverage formula, there is doubt under which section of the Act the literacy test will be suspended. We do not feel that this doubt can prevent plaintiffs from having standing to challenge both sections, when it is undisputed that one or the other section will apply in the near future, and when the risk that either one will apply is substantial. The question raised by section 201, therefore, becomes only an aspect of the issue of ripeness.

[15] Section 4(b) of the Voting Rights Act as amended reads, "A determination . . . of the Director of the Census under this section . . . shall not be reviewable in any court . . ." We consider that it would be incorrect to read this provision as permitting the Census Director to delay making a determination whether New York County fell within the coverage formula until after the November election. Granted that waiting for the 1970 census figures would give a more accurate estimate of New York population in 1968, see note 14 *supra*, such a delay would frustrate a statute written to go into effect immediately. Accuracy of estimate cannot be so paramount a claim when the 50 per cent figure approved in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), was obviously an arbitrary, though rational, effort at line-drawing. Congress could have given the Census Director the power to wait indefinitely for the 1970 figures, but any court would hesitate, we feel, to read such a result into the innocuous language of section 4(b).

statute in time to prevent irremediable harm to plaintiffs becomes difficult." Finally, upon our view of

" Nothing in note 16 *supra* should be taken as suggesting that it is not appropriate for the Census Director to continue to wait for the 1970 census figures, so long as a determination on the best available figures is made in time for the November elections. But it is just this delay which will leave plaintiffs little time for judicial action and appeals. We are not unaware that the court system can act rapidly in special emergencies, but we do not feel that this possibility binds us to refuse consideration of this issue. There is a countervailing interest in the stability of election procedures during the time immediately preceding an election.

To be sure, a finding of ripeness in this case carries with it the possibility that between the date of our opinion and the November election the Census Director will receive the 1970 figures and determine that New York County does not fall within the coverage formula. If not an argument against reaching the merits before such a determination, this may suggest that we should withhold our opinion until it is more likely that the 1970 figures will not be forthcoming in time for the election. It seems to us that the answer to this suggestion lies in our function as the base court in an expedited judicial procedure specially enacted by Congress for cases which seek to enjoin the enforcement of an Act of Congress. 28 U.S.C. §§ 1253, 2282, 2284. Any delay on our part in a case like the one at hand reduces the amount of time that the Supreme Court will have for consideration of the issues in the case. If it is appropriate for a court to delay issuing an opinion as suggested, we feel that it must be the last court in the line of appeals which exercises this discretion.

As a final point, it may seem peculiar to speak of "irremediable harm" when it appears that section 201 of the amended Act will ban New York's literacy test whatever our decision on section 4(a). *See* note 15 *supra*. But we may take judicial notice of the fact that provisions of the Voting Rights Act Amendments of 1970 are on appeal before the Supreme Court and are set for argument before the election. The constitutional bases for section 4 as amended and section 201 are different, so it is possible that section 201 will be struck down while the constitutionality of section 4 is upheld or not reached by the court. Here again, the imminence of the election militates in favor of our reaching the merits.

the merits of the amendments to section 4, there is no reason for waiting for the issue to be presented in a more "concrete situation," [18] rather than on cross motions for summary judgment. All these considerations persuade us that in the exercise of the discretion required of us in injunctive and declaratory action," we may appropriately find this controversy ripe for adjudication.

The constitutionality of the amendments to section 4

Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude." Section 2 provides: "The Congress shall have power to enforce this article by appropriate legislation." The Court in *South Carolina* v. *Katzenbach* faced the argument that the Fifteenth Amendment permits only the judiciary to strike down state statutes and procedures—that "to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role." [20] This argument was emphatically and unanimously rejected by the Court.[21]

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[18] *See* Toilet Goods Assn. v. Gardner, 387 U.S. 158 (1967).

[19] *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

[20] 383 U.S. at 325.

[21] Justice Black concurred and dissented, but his disagreement was on other grounds. He specifically agreed with the Court's holding that Congress had acted properly under section 2 in enacting the Voting Rights Act of 1965.

". . . § 2 of the Amendment unmistakably gives Congress specific power to go further and pass appropriate legislation to protect this right to vote against any method of abridgement no matter how subjtle." 383 U.S. at 355.

> By adding [§ 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia*, 100 U.S. 339, 345.[22]

The measure of congressional power under the enforcement provision of the Fifteenth Amendment is "the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the State."[23] The test, then, is that enunciated by Chief Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The essential question for the Court, accordingly, was whether Congress had enacted a statute which was a rational means of effectuating the constitutional prohibition of racial discrimination in voting.[24] Given the history of discrimination in the use of voting tests in the South, the Court found ample reason to find that the congressional enactment was an appropriate means of protecting the right to vote. Most important, it was appropriate to tie coverage of the

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[22] *Id.* at 325–26.

[23] *Id.* at 326.

[24] The argument that the Act was prohibited by the Constitution would have to rest on the conclusion that the Constitution vested power over voter qualifications exclusively in the States. *See* pp. 24–25 *infra*.

statute to the percentage turnout or registration for the 1964 election.

> The formula eventually evolved to describe [the areas affected by the Act] was relevant to the problem of voting discrimination, and Congress was therefore entitled to infer a significant danger of the evil in the few remaining States and political subdivisions covered by § 4(b) of the Act.[25]

There can be no doubt after *South Carolina* v. *Katzenbach* that Congress acted within its section 2 power in enacting the 1970 Amendments to section 4. If it was appropriate for Congress in 1965 to base coverage on a 50 per cent standard and the most recent presidential election, then plaintiffs have a heavy burden if they wish to persuade us that it is inappropriate for Congress to base coverage *again* on the most recent presidential election when, in 1970, it is extending the original Act for five years. Plaintiffs have shown no significant difference between the two elections. Nor do we read the Court's opinion in *South Carolina* v. *Katzenbach* as relying upon certain unique characteristics of the 1964 election.[26] It may be true, as plaintiffs claim, that New York County

[25] 383 U.S. at 329.

[26] The Court did say the following:

"The areas listed above, for which there was evidence of actual voting discrimination, share two characteristics incorporated by Congress into the coverage formula: the use of tests and devices for voter registration, and *a voting rate in the 1964 presidential election at least 12 points below the national average.*"

383 U.S. at 330 [emphasis added]. As the only such reference in an opinion which repeatedly emphasized the general rationality of tying coverage under the statute to the voting rate, we cannot say that it precludes the 1970 Amendment.

does not have a history of discrimination in the use of its literacy tests.[27] Nevertheless,

> [t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters. Accordingly, the coverage formula is rational in both practice and theory.[28]

We uphold the 1970 Amendments to section 4 of the Voting Rights Act of 1965.[29]

II. KATZENBACH *v.* MORGAN

We turn now to the case which followed *South Carolina v. Katzenbach* by three months and which constitutes the most important opinion by the Supreme Court on the question of congressional power under

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[27] Under Section 4(a), 42 U.S.C. § 1973b(a), if plaintiffs can prove their claim in the United States District Court for the District of Columbia, their county may be exempted from the section 4(a) prohibition. *But see* Gaston County v. United States, 395 U.S. 285 (1969), discussed at p. 27 *infra*, and Section 201 of the Voting Rights Act as amended, note 53 *infra*.

[28] South Carolina v. Katzenbach, 383 U.S. at 330.

[29] Plaintiffs also challenge the 1970 Amendments to section 5 of the Voting Rights Act of 1965. *See* Appendix B *infra*. They alleged in their complaint that section 5 as amended would affect New York County, but defendants denied any immediate impact, and the provision played no further part in this litigation. Since plaintiffs have made no showing that section 5 is likely to be applied to any specific law, regulation or procedure of New York County, we think that at the very least they have not demonstrated that their claim is ripe for injunctive and declaratory relief. We therefore dismiss without prejudice those parts of plaintiffs' counts which challenge the amendments to section 5.

the enforcement provisions of the Civil War Amendments. *Katzenbach v. Morgan*, 384 U.S. 641 (1966), was a declatory judgment action brought by New York voters joined by the state attorney general to challenge the constitutionality of section 4(e) of the Voting Rights Act of 1965.[30] That section provided that no state could bar any person from voting solely on grounds of English illiteracy if that person could demonstrate that he had been educated in an American-flag school "in which the predominant classroom language was other than English." The sole practical effect of section 4(e) was to enfranchise Puerto Ricans living in New York State who had been barred from voting by that state's literacy requirement.[31]

In upholding the constitutionality of section 4(e), the Court applied to section 5 of the Fourteenth Amendment—"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—the doctrine enunciated in *South Carolina v. Katzenbach*. The question before the Court was not the constitutionality of the New York law, but the following:

> Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? In answering this question, our task is limited to determining whether such legislation is, as required by § 5, appropriate legislation to enforce the Equal Protection Clause.[32]

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[30] 42 U.S.C. § 1937b(e).

[31] N.Y. CONST., Art. II, § 1; N.Y. ELECTION LAW § 150, 168. *See* note 7, *supra*.

[32] Katzenbach v. Morgan, 384 U.S. at 650.

And once again, the Court quoted Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[33]

Thus far, the Court was only repeating its unanimous opinion in *South Carolina* v. *Katzenbach*. Yet two members of the Court dissented strongly from the conclusion that section 4(e) was an appropriate enactment to enforce the Equal Protection Clause. Justices Harlan and Stewart agreed that

> . . . § 5 most certainly does give to the Congress wide powers in the field of devising remedial legislation to effectuate the amendment's prohibition on arbitrary state action . . .,[34]

but they found the South Carolina doctrine inapplicable.

> Section 4(e) . . . presents a significantly different type of congressional enactment. The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether . . . a particular state practice or, as here, a statute is so arbitrary or irrational as to offend the command of the Equal Protection Clause . . . .[35]

In *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), the Court had upheld a state's English literacy requirement against constitutional attack. Therefore, said Mr. Justice Harlan,

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[33] McCulloch v. Maryland, 4 Wheat. 316, 421 (1819).

[34] 384 U.S. at 666.

[35] *Id.* at 667..

> I do not think it is open to Congress to limit the effect of that decision as it has undertaken to do by § 4(e). In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.[36]

The doubts and fears expressed by the dissenting Justices have not been stilled in the four years since *Katzenbach* v. *Morgan*.[37] Accordingly, although this court is bound to follow the opinion of the Court, the importance of the general question, as well as the importance of the particular issues presented by the statute in this case, demands that we examine carefully the justifications that the Court gave for holding that section 4(e) may be regarded as an enactment "to enforce the Equal Protection Clause."

The majority opinion gave two grounds for sustaining section 4(e). First:

> [Section] 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voter qualifications and the provision or administration of governmental services . . . .
>
> Section 4(e) may be readily seen as "plainly adapted to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right

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[36] *Id.* at 668.

[37] *See, e.g.*, statement and testimony of Dean Louis H. Pollak, Yale Law School, *Hearings on Lowering the Voting Age to 18 Before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 91st Cong., 2d Sess. 249–73 (1970).

> to vote to large segments of its Puerto Rican community. . . . This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain" perfect equality of civil rights and equal protection.[38]

This may be described as the "remedial" or "ameliorative" rationale of *Katzenbach* v. *Morgan*. The potential evil—discrimination by government against an ethnic minority—is so clearly within the Equal Protection Clause as to need no discussion. Given that, the Court gave Congress wide latitude in choosing means to protect against the evil.

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress . . . to assess and weigh the various conflicting considerations . . .[39] It is not for us to review the congressional resolution of these factors. It is enough that we be able to *perceive a basis* upon which the Congress might resolve the conflict as it did.[40] [Emphasis added.]

While this rationale seems well within the expansive reading of Congress's power given in *South Caro-*

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[38] 384 U.S. 651–53.

[39] ". . . the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school."

384 U.S. at 653.

[40] *Id.*

lina v. *Katzenbach,* Mr. Justice Harlan was correct in noting that an additional step had been taken. In the provisions of the Voting Rights Act of 1965 upheld in *South Carolina,* Congress had suspended state literacy tests concerning which there was a showing of great danger—based on past experience—that they would be discriminatorily applied. In *Katzenbach,* however, the connection between suspended state statute and possible discrimination was more tenuous. The first rationale, then, showed that the court seriously intended to give wide scope to Congress's ameliorative powers. On the other hand, the role of judicial review remained clear. As the often repeated quote from Justice Marshall specifies, a court must make the initial—and independent—judgment whether the evil attacked by Congress is one which comes within the scope of the Equal Protection Clause.[41] Second, when purporting to act under section 5 of the Fourteenth Amendment, Congress may not itself deny persons equal protection or due process of law; such a claim would present another question concerning which a court is not bound to give unusual deference to congressional judgment.[42] Only after these preliminary decisions does the loose "able-to-perceive-a-basis" test enter as the standard for review of the appropriateness of the means Congress has chosen.

The second rationale for the Court's decision in *Katzenbach* was stated very differently and does not stem so directly from *South Carolina* v. *Katzenbach.*

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[41] *See* United States v. Guest, 383 U.S. 745, 783–85 (1966).

[42] *See* 384 U.S. at 651 n.10, *quoted* at p. 22 *infra.* While primarily directed at Mr. Justice Harlan's criticism of the second rationale, *infra,* this footnote appears in the Court's opinion before either rationale is presented.

We think it necessary to quote extensively from the Court's opinion:

> The result is no different if we confine our inquiry to the question whether § 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishng voter qualfications. We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned . . . whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. Finally, Congress might well have concluded that as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs. Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting, see *South Carolina* v. *Katzenbach* . . . , to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that *we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement* to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in

> which the language of instruction was other than English *constituted an invidious discrimination in violation of the Equal Protection Clause.*[43] [Emphasis added.]

This we may call the "discretionary" rationale of *Katzenbach* v. *Morgan,* and it is here that the Court's granting to Congress the "power to define the substantive scope" of the Equal Protection Clause has seemed so potentially dangerous. The Court took pains, however, to limit congressional discretion under this rationale as it had under the first. Footnote 10, 384 U.S. at 651 reads:

> Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. . . .[44]

This footnote surely makes clear that when Congress has purported to act under this second rationale, but a plaintiff comes to court alleging that the congressional enactment denies him equal protection or due process of law, then a question has been presented upon which the court must make a independent judgment, giving Congress no more deference than is usual when such constitutional claims are made.[45] Whatever

[43] 384 U.S. at 653–56.

[44] This note was cited by the Court in Shapiro v. Thompson, 394 U.S. 618, 641 (1969).

[45] It might seem that more deference than usual *will be* given Congress when the enactment is claimed to abridge an equal protection right. For in *Katzenbach* v. *Morgan* itself, the Court met the objection that section 4(e) discriminates against

rationale Congress acts under, it is not permitted to abridge individual rights which the Supreme Court has in the past or would now protect.

The point of the "discretionary rationale," we think, is to permit Congress to make distinctions which the judicial branch of government, with its special obligation to make only principled decisions, would find difficult or impossible.[46] Congress can take a more generous view of the Equal Protection Clause than the courts, up to the point at which other persons' fundamental rights begin to be abridged; it cannot take a narrower view.[47] It is by no means clear that to permit Congress such discretion is more "unusual" or "dangerous to the federal system" than to apply

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Spanish speaking citizens educated in non-American flag schools by observing that section 4(e) was a "reform" measure and that "reform may take one step at a time." 384 U.S. at 657. Still, deference is not the only explanation for the Court's decision here. We note in passing that in *Shapiro* v. *Thompson*, 394 U.S. 618, 641 (1969), the Court said, "Congress may not authorize the States to violate the Equal Protection Clause." Failure to prohibit is not necessarily authorization; therefore the Court's approval of section 4(e) would suggest nothing about the constitutionality of New York's continuing to discriminate in voting against Spanish speaking citizens educated abroad—from the point of view of the Court or from the point of view of Congress.

[46] We do not pretend that this approach to *Katzenbach v. Morgan* is original. For one perceptive article supporting a similar analysis, *see* Robert A. Burt, *Miranda & Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81.

[47] It may be that in certain areas there is no room for congressional discretion—that the state laws are constitutional under the Court's interpretation of the Equal Protection Clause and any act of Congress striking them down would violate the Equal Protection Clause in a different way. This will not be typical, however, and we think that our discussion of the provisions of the 1970 Amendments indicates the very separate nature of the two questions.

the remedial rationale, which permits Congress to create criminal sanctions where all agree the courts would have no power under section 1 of the Fourteenth or Fifteenth Amendments.[48] The application of the remedial rationale in *Katzenbach v. Morgan* itself indicates the breadth of congressional power on that theory. When Congress acts under either rationale, the courts will have a difficult task in allowing Congress its legitimate power under the enforcement provisions of the Fourteenth and Fifteenth Amendments, and at the same time keeping that power within constitutional bounds. But it is certainly not apparent that the task cannot be done, consistently with the principles of judicial review developed in our law.

We turn now to the remaining provisions of the Voting Rights Act Amendments of 1970.

III. APPLYING THE KATZENBACH *v.* MORGAN RATIONALES

The remaining provisions of the 1970 Amendments strike down, in order, state literacy requirements, certain state residency requirements for voting in presidential elections, and certain state age requirements. Just over five years ago, Justice Harlan could still say in dissent:

> Anyone not familiar with the provisions of the Fourteenth Amendment, the history of that Amendment, and the decisions of the Court in this constitutional area, would gather from today's opinion that it is an established constitutional tenet that state laws governing the qualifications of voters are subject to the limitations of the Equal Protection Clause. Yet any dispassionate survey of the past will reveal that the present decision is the first to so hold.[49]

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[48] *See United States* v. *Price*, 383 U.S. 745 (1966).

[49] Carrington v. Rash, 380 U.S. 89, 97 (1965) (opinion of the Court by Mr. Justice Stewart).

No similar doubts about the state of the law could be held today. Holding Virginia's poll tax unconstitutional in 1966, the Court said:

> [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. . . . Our cases demonstrate that the Equal Protection Clause . . . restrains the States from fixing voter qualifications which invidiously discriminate.[50]

Just a few months ago, in an opinion concurred in by the eight then active members of the Court, that quotation was echoed. Moreover, the Court said,

> [t]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. . . . And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.[51]

In short we are not here dealing with issues to which the application of the Equal Protection Clause is farfetched or surprising. Plaintiffs' historical argument that the Equal Protection Clause may not be applied to voting or to voter qualification laws has been resolved against them.[52] With that question decided, there are few issues indeed to which any notion of equality could have so central an application as the right to vote.

The ban on literacy tests

Section 201 of the Voting Rights Act as amended suspends until August 6, 1975, the use of literacy tests

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[50] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665–66 (1966).

[51] Evans v. Cornman, 398 U.S. 419, 422 (1970).

[52] Reynolds v. Sims, 377 U.S. 533 (1965), and cases cited *supra*.

and any similar "test or device" in any state in which such tests are not already suspended by operation of section 4(a) of the Act.[53] Fifteen states will be immediately affected by this provision.[54]

Although the Supreme Court upheld against constitutional attack the North Carolina literacy test in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), such requirements have been put

[53] Section 201(a) reads:

"Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act."

The grammar of this sentence at first leads one to think that a state like Alaska—whose literacy test was banned under section 4(a) because it fell within the 50 per cent coverage formula, but which sued successfully in court to have the ban lifted—would *not* fall under the terms of section 201(a). All the briefs in this case have assumed that between section 4(a) and section 201 all literacy tests in the country would be prohibited. Since the language of the provision can be read to reach this result, and since we have seen nothing in the hearings or debates to suggest that Congress clearly intended to enact the other, more peculiar, result, we have assumed, without deciding, that all literacy tests which are not already prohibited do fall under Section 201.

We note that the date when the period of suspension under Section 201 is to end corresponds to the time of operation of subsection 4(a) as amended.

[54] Literacy tests are suspended by section 201 in Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, Wyoming, and 61 counties of North Carolina. Moral character provisions are suspended in Connecticut and Idaho. *See House Hearings*, *supra* note 3, at 90. Hawaii's literacy test has been repealed. HAWAII REV. STAT. § 11-4, as amended (1969).

in a precarious position by the Court's opinion in *Gaston County* v. *United States*, 395 U.S. 285 (1969). There the county brought an action under section 4(a) of the Voting Rights Act to escape suspension.[55] The Supreme Court concluded that in such an action

> it is appropriate for a court to consider whether a literacy or educational requirement has the "effect of denying . . . the right to vote on account of race or color" because the State or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age.[56]

There is little question that the principle of this case has serious implications for many areas of the country outside the South.[57] Accordingly, we feel there is no need to make an extensive review of the hearings and findings of Congress to convince ourselves that there is a basis upon which Congress could predicate a judgment that state literacy requirements, at this point in time in our society, constitute an invidious discrimination in violation of the Equal Protection Clause.

Even the remedial rationale of *Katzenbach* v. *Morgan* is persuasive here. The ban on literacy tests is plainly adapted to enabling the Negro minority, for example, to obtain "nondiscriminatory treatment by government." The remedial nature of section 201 is further suggested by its expiration in five years. Thus not only its legislative history but its actual

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[55] The provision for escaping suspension is described at p. 6 *supra*. *See also* Appendix B *infra*.

[56] 395 U.S. at 293.

[57] *See, e.g.*, Hobsen v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd in part and remanded sub nom.* Smuck v. Hobson, 408 F.2d 175 (1969).

effect is closely tied to that paradigmatic remedial statute, the original Voting Rights Act of 1965."

Abolition of durational residency requirements in Presidential elections

Section 202(b) of the Voting Rights Act as amended states that Congress has found it necessary, to secure and enforce certain constitutional rights of citizens,

> (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

Section 202(c) enacts the abolition of such durational residency requirements. Section 202(d) requires each state to provide for the registration of all otherwise qualified residents who apply at least 30 days before a presidential election. Section 202(e) provides that any otherwise qualified person who moves to a state or political subdivision within 30 days of a presidential election and who is not eligible to vote in his new location must be allowed to vote for President and Vice President, in person or by absentee ballot, in the state or subdivision in which he previously resided. The net result of these provisions is to make it possible for any otherwise qualified person to vote in a presidential election, regardless of the date at which he changes his residence.

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[58] Plaintiffs argue that section 201 covers areas that do not have histories of discriminatory use of literacy tests, and that unlike under section 4(a), there is no escape from the section 201 ban. It was not irrational for Congress to take account of the potential for discriminatory use of literacy tests, and to take note of the difficulty that states would have of proving nondiscriminatory use in the future.

In *Dreuding* v. *Devlin*, 380 U.S. 125 (1965), the Supreme Court summarily affirmed a district court decision[59] upholding a one-year residency requirement which applied to presidential elections. In 1969, the Court dismissed as moot another challenge to a state's six-month residency requirement for voting in such elections,[60] but the two dissenting members of the Court reached the merits. Justice Marshall, with Justice Brennan concurring, said:

> It seems to be clear that *Drueding* is not good law today . . .
> . . . [I]f it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose.[61]

We think that nothing need be added to Mr. Justice Marshall's thorough discussion of the interests at stake to permit us to conclude that Congress could find that durational residency requirements violate the Equal Protection Clause.[62] A state's interest in at-

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[59] 234 F. Supp. 721 (D. Md. 1964).

[60] Hall v. Beals, 396 U.S. 45 (1969).

[61] *Id.* at 52.

[62] The opposing state interests he discussed were the state's parochial interest in the outcome of the election, insuring that the new resident understands local issues, protecting against non-resident voting, and administrative convenience.

It should be noted that while the qualifications for electors of members of Congress are tied in the Constitution to the qualifications of electors for the state legislatures, art. I, § 2, the provision regarding selection of the President merely says: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors . . ." for the purpose of choosing a President and Vice President. Art. II, § 1. There-

tempting to guarantee that every voter be familiar with local issues before he votes for President cannot be described as compelling, when measured against the importance of the right to the transient citizen. And the argument from administrative convenience seems weak when a substantial majority of the states permit registration by at least some classes of citizens up to the thirtieth day prior to a presidential election.[63] The scheme devised by Congress to apply uniformly throughout the country is an obviously rational means of ensuring that unnecessarily long residency requirements are not put into effect by states, and of simplifying for the voter the task of determining where he is permitted to vote.

Reducing the voting age 18 in Federal, State and local elections

Section 302 of the Voting Rights Act as amended reads:

> Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

In considering this provision, we are met at the outset by the argument that section 2 of the Fourteenth Amendment constitutes a limitation upon the general

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fore, while a state may have a compelling interest in local elections and tailor its voter qualification laws accordingly, it does not follow that equally strict qualifications for voting in presidential elections are required.

[63] *See* 116 *Cong. Rec.* 3543 (daily ed., March 11, 1970) (memorandum on registration closing days submitted by Senator Goldwater).

language of section 1 and prevents an interpretation of "equal protection" which leads to a prohibition of state laws fixing the voter qualification age at 21 years. Section 2 reads:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, *being twenty-one years of age*, and citizens of the United States, or in any way abridged, except for participation in rebellion, or in other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens *twenty-one years of age* in such State. [Emphasis added.]

Initially, we note that what this section provides for is the reduction in representation in Congress for those states which deny the right to vote to a specified class of citizens. Thus the enactment itself places no limitation whatsoever upon the application of section 1. In fact, though, the class specified in section 2 reflects closely the voter qualification laws with respect to age, sex, and crime in the states at the time of the ratification of the Amendment. Several arguments then can be made for limiting section 1.

Mr. Justice Harlan, dissenting in *Reynolds* v. *Sims*, 377 U.S. 533, 589 (1964), argued that section 2 showed that section 1 was not intended to apply to voting at all. Alternatively, section 2 may show that section 1 was not intended to apply to state voting

qualification laws. Whatever the strength of these historical arguments, they have been consistently rejected by the Supreme Court.[64] What is left, then, is to argue that the specific mention of *particular* bases for limiting the franchise manifests an understanding by the Framers that states could appropriately limit their electorate in those ways. Given the previous decisions of the Supreme Court which foreclose the issue of the Framers' intent with respect to some aspects of the application of the Fourteenth Amendment to voting, we think that only a very contrived argument could be presented that the Framers' understanding in regard to age, sex, and crime was sufficiently clear to restrict the meaning of section 1.

In his scholarly discussion of the legislative history of the Equal Protection Clause and section 2 of the Fourteenth Amendment, Judge MacKinnon concludes that whether the Framers intended to approve 21 as the legal voting age is a question that must remain unanswered. We fully concur. But whatever the Framers' understanding, the essential point for us is that they did not enact it into law. What they did was to guard against increased Southern representation in Congress from the end of the Three-Fifths Compromise,[65] while at the same time providing for a severe sanction if any state discriminated against voters in the manner most likely to occur at that time. We hold that section 2 has no limiting effect on the general language of section 1 with respect to voter

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[64] *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Evans* v. *Cornman*, 398 U.S. 419 (1970).

[65] CONST., art. I, § 2, cl. 3. *See* William W. Van Alstyne, *The Fourteenth Amendment, The Right to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 Sup. Ct. Rev. 33, 44.

qualifications, and thus no limiting effect on congressional power under section 5.[66]

The sole question remaining in this case, then, is the following: Is the congressional determination that denying the right to vote to otherwise qualified citizens between the ages of 18 and 21 constitutes an invidious discrimination in violation of the Equal Protection Clause utterly lacking in rational support? Surely this is, as Mr. Justice Frankfurter observed in another setting, "one of those rare instances where to state the question is in effect to answer it."[67] The fundamental importance of the right to vote is clear from the cases we have already cited. The hearings in Congress and the briefs in this case contain extensive citations of the maturity of 18-year-olds, their high level of education in comparison with voting citizens of the past, the extent to which state laws already treat them as mature adults, and their awesome duties to the country under federal law. We do not find it necessary to specify the weight that must be given

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[66] The only meaning we can attach to the first phrase of section 302 of the Voting Rights Act as amended ("Except as required by the Constitution, . . .") is that Congress meant to defer to the courts the resolution of this controversy concerning the effect of section 2. We think, however, that even in the absence of this phrase, the judicial branch would be required to decide this question independently. Whether section 2 limits section 1 is a narrowly legal question in the sense that it involves neither the appropriateness of certain action to secure a constitutional right, nor the establishing of a legal classification where complex sociological judgments regarding the invidiousness of a discrimination must be evaluated. A contrary decision to the one we have reached on section 2 would mean that the Equal Protection right is inapplicable to voters under 21. Section 302 then would be beyond Congressional powers under section 5 of the Fourteenth Amendment.

[67] Goesaert v. Cleary, 335 U.S. 464, 465 (1948).

these various factors when we review—under even the loosest standard—a congressional extension of the franchise to younger citizens. For the rationality of the congressional determination was virtually uncontested in this case, in the congressional debates, and in the public debate, of which we may take judicial notice.

Two sorts of arguments have dominated the field of opposition to section 302. On the one hand, the fear is expressed that Congress might later *deny* the vote to 18-year-olds. This is a danger precisely treated by footnote 10 of majority opinion in *Katzenbach* v. *Morgan*,[68] and it is clear that Congress would have a very difficult time justifying this enactment under section 5.[69] A related, but different fear is that Congress will simply repeal section 302. Whatever standard of review is applied to such congressional action,[70] 18-year-old citizens would certainly then be able to renew their judicial attack on any state law that went back into effect and denied them the vote. The difficult question whether these laws fall of their own weight

[68] *See* p. 22 *supra*.

[69] There is no indication in the opinions of the Supreme Court that it would require other than the same "compelling interest" that it requires from the states when citizens are being denied the right to vote. Congress would be in an even more difficult position if it were trying to deny the right to vote to a group to which some states had decided to grant it. Would Congress be acting to enforce the Equal Protection Clause? It is difficult to construct an argument that permitting 18-year-olds to vote denies fundamental rights to those over 21 or discriminates against them invidiously.

[70] Here, as in note 45 *supra*, we might observe that failure to prohibit a state practice is not necessarily authorization of that practice. *See also* the discussion of section 2 of the Fourteenth Amendment *supra*, and Shapiro v. Thompson, 394 U.S. 618 (1969); *cf.* Reitman v. Mulkey, 385 U.S. 967 (1967).

under section 1 of the Fourteenth Amendment, which Congress by enacting section 302 has rendered it unnecessary for the Supreme Court to decide, would then have to be resolved.

On the other hand, the fear is expressed that Congress, in an ecstasy of reform will prohibit states from denying the vote on the basis of age to those over 12, over 5, and so forth. Perhaps Congress could decide that age is an impermissible basis for classification for the purposes of voting. We do not mean to belittle this fear, nor to belittle the concerns which could lead Congress to consider such apparently farfetched reforms. All we say now is that such measures—on a gradually increasing scale—will pose different questions. It may well be irrational for Congress to describe as an invidious discrimination a voting qualification which excludes a class the vast majority of which have *no* serious appreciation of the issues typically involved in a national, state or local election. We have seen no indication that opposition to granting the vote to 18-year-olds is based on such an argument.

We hold, accordingly, that section 302 of the Voting Rights Act as amended was an approprite exercise of congressional power.

DAVID L. BAZELON,
Chief Judge.

WILLIAM B. BRYANT,
District Judge.

C.A. No. 1862–70—*Christopher* v. *Mitchell*

MACKINNON, *Circuit Judge:* concurring in part and dissenting in part: I join the foregoing opinion except for its treatment of Title I, section 4 (relating to the trigger provisions for the literacy tests) because

I view plaintiffs' attack on that section to be premature. I also have some additional views concerning the constitutionality of Title III.

TITLE I—THE TRIGGER PROVISIONS

Section 4(b) of the Voting Rights Amendments of 1970 provides, *inter alia:*

> ". . . the provisions of subsection (a) [Sec. 4(a) of the Voting Rights Act of 1965] shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, *and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968.*" (Emphasis added).[1]

The requirement that the Director of the Census shall determine the factual matters specified in the statute requires such determination to be made concerning facts which existed on November 1, 1968. With respect to this statutory requirement the Director of the Census advised the Assistant Attorney General of the United States by letter of July 27, 1970[2] that the Census Bureau "could not in good conscience make

[1] The determinations made in accordance with this section indicate the states or subdivisions which are to be subject to § 4(a) (suspending literacy tests), § 5 (requiring prior approval of changes in voting laws) and § 6 (relating to federal examiners) of the Act. Section 6 is not under attack in the instant case and plaintiffs' challenge to § 5 has been dismissed because it is premature. As used herein, the term "trigger provisions" refers to §§ 4 (a) and (b) because they together operate to suspend the operation of literacy tests in certain states and political subdivisions.

[2] *See* majority opinion, footnote 14.

the determinations without the benefit of new benchmark data. New benchmark data [would] be uniformly provided by the 1970 census." He added, it was necessary for the Census Bureau "to wait for the results of the 1970 census" which would not become available for New York until "toward the end of the year."[3] We are thus faced with the fact that the person designated by Congress in the statute to make the required important determinations that trigger the application of the Act has stated, in effect, that he cannot make a good faith determination of the required facts until later in the year when the necessary underlying data will be available, and with the fact that the required determination has not been made.

In the fact of this recognition of the non-existence of the underlying factual material from which the statutory determination, in the opinion of the Census Director, *must* be made, and also the non-existence of the statutory determination by the Director, the majority opinion in footnotes 16 and 17 questions whether the Director of the Census has discretion to "delay" making the determination on the "best available figures." In my view it is not a question of discretion for the Director but a matter of what the statute directs him to determine and the date concerning which such determination must be made. In this respect the statute is very definite. He must determine the necessary facts involving population, registrations and voting as of November 1, 1968. And he has stated that he cannot do this in good conscience until the 1970 census figures are available.[4] Footnotes 16 and 17

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[3] *Id.*

[4] To wait until then is not to delay. Delay would only occur if he failed to make his necessary decision within a reasonable time after the necessary data was available.

suggest, in effect, that the Census Director, lacking the necessary 1970 data, should make the determinations on the basis of the 1960 census figures and implies that the court might so direct him to make his determination.[5] But the statute designates the Census Director as the person to make the decisions, and not this court or any other person. Furthermore, the decision of the Census Director on the matter is final and conclusive and "not reviewable in any court."[6] It is accordingly my opinion that there is no basis for the court in this case to question the Director's preliminary decision as to what underlying factual data he needs to permit him to make the statutory determination committed to his unreviewable judgment.

The court's opinion, however, does not go so far as to order the Director to make the determination on the basis of the 1960 data. Rather, it states:

> [I]t is clear that there is a danger that Section 4(a) will apply to New York County, whenever the determination is made by the director of the census. Plaintiffs' assertions to this effect were uncontested by defendants.

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[5] This would be the substantial equivalent of requiring a court to decide a case before all the evidence is in.

[6] Sec. 4(b) of the Voting Rights Act of 1965, 79 Stat. 438, 42 U.S.C. § 1973b(b) (Supp. V, 1969), reads in part:

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

The language of the statute is sufficiently definite to preclude the operation of the general presumption of reviewability. *See* Shilling v. Rogers, 363 U.S. 666 (1960); Calderon v. Tobin, 88 U.S. App. D.C. 134, 187 F. 2d 514, *cert. denied*, 341 U.S. 935 (1951). See generally, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.15 (1958).

In my view this holding that we are required to accept plaintiffs' factual assertions, which are contained in his brief and which do not even rise to the dignity of factual allegations in his pleadings, is impermissible. First, the court is denied the power to substitute its factual determination, or that of the plaintiff, for that of the Census Director by section 4(b) of the Voting Rights Act of 1965.[7] This section, as above stated, prohibits the court from reviewing the Director's determination and, in my opinion, even his preliminary determination that he cannot make the required determination without the 1970 census figures, is a "determination . . . under this section [§ 4(b)]"[8] of the Act. Secondly, the statute requires the determination to be made by the Census Director and that admittedly has not been made.

It seems clear that Congress intended a good faith determination to be made by the Director and that until the necessary underlying facts are available from which such determination can be made by the person designated by the statute it would not be sufficient to substitute a determination or mere allegation by another person which admittedly is based on factual data that the person designated by the Act considered to be inadequate. It is obvious that such would not be a determination by the Director of the Census.

Further, the statute directs that the Director of the Census shall "determine" the required factual matters. To determine something means "to fix conclusively or authoritatively . . . to settle a question or controversy . . . ." Under its preferential dictionary

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[7] *See* note 6 *supra*.

[8] *Id.*

definition the word means an *authoritative decision* on the matter involved. WEBSTER'S NEW INTERNATIONAL DICTIONARY 616 (3d ed. 1961). A secondary meaning of the word is "to establish casually." It is apparent from the context of this statute, and the vital importance of the matters that flow from the determination, that Congress intended to direct that an authoritative and not a casual determination was to be made. The determination was not to be a guess.* That is the difference between what footnote would substitute for the Director's determination and my view of what the Act requires.

In sum, in my view of this proceeding in its present context, we are dealing with a motion for summary judgment in which it is admitted that the 1970 census figures are not available. It is also admitted that the Director of the Census has decided that he cannot make an accurate determination of the facts he is directed to make by the Act until the 1970 figures are available and necessarily that he has not made such determination. All this supports the conclusion that plaintiffs' attack on section 4 at the present time is premature. The essential facts are not presently known, the required determinations have not been made, and the requirements of the statute that the matter be determined on the basis of the stated facts as of November 1, 1968, and not on some other basis, cannot be evaded by substituting for the required facts conclusory allegations which all know have no true basis in fact. I would accordingly grant the motions of the Attorney General and of the New York City Board of Elections for summary judgment and dismiss

*I differ with the statement in the majority opinion which infers that "accuracy" of the determination is not essential. *See* note 16 of the majority opinion.

Counts 7 and 8 for failure to state a claim upon which relief can be granted. *See South Carolina* v. *Katzenbach*, 383 U.S. 308, 317 (1966); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967); *Davis* v. *Ichord*, — U.S. App. D.C. —, — F. 2d — (No. 23426, Aug. 20, 1970) (Leventhal, J., concurring).[10] This suggested disposition of this phase of the case would, of course, not preclude any of the plaintiffs or others from bringing a suit after the Director of the Census has made the statutory determinations.

Another question is presented by that portion of the majority opinion which suggests because there is a substantial likelihood that Title I may apply to New York County that we should accordingly decide now upon its constitutionality. However, in view of our disposition of section 201, and since sections 4 and 5 raise difficult constitutional questions even beyond *South Carolina* v. *Katzenbach, supra*, the possibility that Title I will eventually become applicable to New York County does not justify us in undertaking to decide these issues at this time.

TITLE III—THE 18-YEAR-OLD VOTING PROVISION

In addition to the reasons announced in the majority opinion in my view there are additional reasons for holding that the 18-year-old voting provision contained in section 302 of the 1970 Amendments is within the power of Congress conferred by the Fourteenth Amendment. It was argued before this court that the

[10] The issues involved in Title I were almost totally ignored in both the briefs and at oral argument. Nevertheless, with respect to § 4(a), I agree with the majority opinion that there is probably a case or controversy in the narrow sense and thus rest my disagreement on what I view to be a proper exercise of discretion by this court.

framers of the Fourteenth Amendment did not intend it to apply to voter qualifications and that the states,[11] under our consitutional system, would retain the exclusive power in that area. In support of this contention, plaintiffs referred to remarks made in the congressional debates which preceded the passage of the Fourteenth Amendment. The most emphatic statement to this effect was that made by Representative Bingham of Ohio, a member of the Joint Committee on Reconstruction and the author of section 1 of the Fourteenth Amendment:

> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny any freeman the equal protection of the laws or to abridge the privileges and immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the Several States.
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> The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . . .[12]

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[11] It is impliedly admitted by all the arguments that the strict language of the Fourteenth Amendment is broad enough to cover voter qualifications. Thus, the only means of escaping such interpretation is to prove a controlling contrary intention by those who caused it to be adopted, or to rely upon the effect of other provisions of the Constitution upon the provisions of the Amendment, or a combination of both.

[12] Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). A number of other references to the congressional debates to the same general effect are set forth in the dissenting opinion of Mr. Justice Harlan in Reynolds v. Sims, 377 U.S. 533, 595–602 (1964). *See also* Van Alstyne, *The Fourteenth Amendment, The*

Bingham also remarked:

> To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the

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"Right" to Vote, and the Understanding of the Thirty-ninth Congress, 1965 Sup. Ct. Rev. 33.

Rep. Bingham did, however, recognize the right of the people of each state to have a republican form of government. Cong. Globe 39th Cong., 1st Sess. 2542 (1866). Others contended that the Constitution conferred upon Congress the power to regulate suffrage so as to prevent widespread disenfranchisement. For example, Rep. Lawrence of Ohio, in discussing the Civil Rights Bill, stated:

"A State which denies to half its citizens, not only all political, but their essential civil rights, recognized and confirmed by the national Constitution and described in this bill, has ceased to be republican in form, and the Constitution has made it the duty of Congress to 'guarantee' such form of government. This it may do by law in this form."

Cong. Globe, 39th Cong., 1st Sess. 1836–37 (1866). Rep. Eliot of Massachusetts, discussing the precurser to § 2 of the Fourteenth Amendment, stated:

"[W]hile the Constitution now says that Congress shall guaranty to every State a republican form of government, this amendment as reported by the committee admits by implication that, although a State may so legislate as to exclude these multitudes of men, not on account of race or color, but on account of property, yet, nevertheless, she would have a republican form of government, and that Congress will not and ought not to interfere."

Id. at 407. *See also* Van Alstyne, *supra* at 49–53, containing the views of Farnsworth of Illinois, Shellabarger of Ohio, Cook of Illinois and Julian of Indiana. The Supreme Court held that the question of what constitutes a republican form of government is a political question for the Congress alone to answer. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See also* Baker v. Carr, 369 U.S. 186, 209–32 (1962); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917).

> elective franchise, though it be one of the privileges of a citizen to the Republic, is exclusively under the control of the States.[13]

Senator Howard, who was also a member of the Joint Committee, also indicated very strongly that section 1 did "not give to either of these classes [whites or blacks] the right of voting." He remarked,

> The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [*sic*].[14]

He later remarked:

> The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the consession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. . . .
>
> The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.[15]

However, the congressional debates also reflected a number of statements by other members of Congress

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[13] Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

[14] *Id.* at 2766.

[15] *Id.* It is clear that these remarks of Senator Howard were addressed to the "privileges and immunities" portion of section 1 and to section 2 and not to the equal protection provision.

who placed a different interpretation upon the language used in the Amendment. These are gathered in an article by Professor Van Alstyne.[16] The remark with the greatest force and weight to this effect was that may by Representative Rogers of New Jersey, also a member of the Joint Committee on Reconstruction:

> [The proposed Amendment] provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws. What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if [the proposed Amendment] ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody under this term of privileges and immunities.[17]

The foregoing quotations must be read in light of the fact that there appear to have been two bodies of thought prevalent in Congress at the time concerning congressional power to regulate suffrage. One group was of the opinion that Congress had some power

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[16] *See* note 12 *supra*.

[17] Cong. Globe, 39th Cong., 1st Sess. 2538 (1866). Others who voiced similar sentiments included Rep. Boyer of Pennsylvania, *id.* at 2467, Rep. Phelps of Maryland, *id.* at 2398, and Rep. Niblack of Indiana, *id.* at 2465.

over suffrage qualifications by Art. IV § 4 [18] guaranteeing a republican form of government; by Art. I § 4, cl. 1 [19] giving Congress power to "make or alter" state regulations as to "the times . . . and manner of holding elections for Senators and Representatives"; and by the provision of Art. I § 2, cl. 1 [20] which recites that the House of Representatives shall be composed of members "chosen . . . by the *people* of the several states." (Emphasis added.) Members of this group who contended that the Fourteenth Amendment did not confer power on Congress to regulate suffrage

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[18] U.S. CONST. Art. IV § 4:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

[19] U.S. CONST. Art. I § 4, cl. 1:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

In *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 171 (1875), Chief Justice Waite recognized the possible role of Congress when he commented on Art. I § 4 of the Constitution:

"It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme *until Congress acts.*" (Emphasis added.)

[20] U.S. CONST. Art. I § 2, cl. 1:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

were not necessarily contending that Congress was to be powerless in the area.[21] The other group did not consider that the Constitution conferred any power in Congress to deal with voter qualifications. Doubtlessly, this latter group relied heavily upon the provisions of Art. I, § 2, cl. 1[22] that for the House of Representatives "the electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." In effect this allowed the state legislatures to set voter qualifications. Some of this group argued that the Fourteenth Amendment contained the potential to confer powers over voter qualifications upon Congress.[23]

The passage of the Amendment thus did not find all parties in agreement on the precise effect it had on the power of the states to regulate suffrage. Nor was the debate ended by the submission of the Amendment to the states and its subsequent ratification.

During the debates which preceded the passage of the Fifteenth Amendment, it was argued by Senator Doolittle of Wisconsin that such Amendment was necessary because the Fourteenth had left state control over suffrage unimpaired.[24] Senator Sumner of Massachusetts, on the other hand, argued that the Fifteenth was unnecessary because the guarantees it contained had already been effected by the Fourteenth

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[21] *See* note 12 *supra.*

[22] *Id.*

[23] *See* note 17 *supra.* The assertion of these numerous differing constructions which were prevalent in Congress contemporaneously with the formulation of the amendment should have alerted those who asserted a different construction to the necessity of including a specific exemption for elections if they desired to exempt elections from the normal meaning of the words used.

[24] Cong. Globe, 40th Cong., 3d Sess., App. 152 (1869).

Amendment.[25] Representative Stevens in 1868 also expressed a similar view although he had not done so explicitly in the congressional debates on the Fourteenth Amendment.[26]

It thus appears that the legislative history of the Fourteenth Amendment is inconclusive and cannot be relied upon to fully support either contention or to furnish a dependable basis for interpreting the Amendment. *See Afroyim* v. *Rusk*, 387 U.S. 253, 267 (1967). *Compare Adamson* v. *California*, 332 U.S. 46, 68–123 (1947) (Black, J., dissenting) and Crosskey, *Charles Fairman, "Legislative History," and the Constitu-*

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[25] Cong. Globe, 40th Cong., 3d Sess. 1008 (1869).

[26] In support of a bill, grounded in § 1 of the Fourteenth Amendment, to prohibit the states from denying the right to vote on account of race, Rep. Stevens remarked:

"Since the adoption of the fourteenth amendment . . . I have no doubt of our full power to regulate the elective franchise, so far as it regards the whole nation, in every State of the Union, which, when tried, I hope, will be so formed as to be beneficial to the nation, just to every citizen, and carry out the great designs of the of the framers of the Government, according to their views expressed in the Declaration of Independence. . . .

"The fourteenth amendment, now so happily adopted, settles the whole question and places every American citizen on a perfect equality so far as merely national rights and questions are concerned. . . .

"If by the amended Constitution every American citizen is entitled to equal privileges with every other American citizen, and if every American citizen in any of the States should be found entitled to impartial and universal suffrage with every other American in any State, then it follows as an inevitable conclusion that suffrage throughout this nation is impartial and universal so far as every human being, without regard to race or color, shall be found concerned, an dso far as it affects the whole nation."

Cong. Globe, 40th Cong., 2d Sess. 1966–67 (1868).

tional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954) *with* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). In the Congress itself there were conflicting opinions as to the effect of what they were doing by the language of the Amendment as adopted and these variable opinions have persisted to the present day. This requires us to rely heavily upon the ordinary meaning of the words used.

This is no less true of the question of the proper age for voting than it is for voting in general. The argument has been made here and in Congress that because section 2 of the Fourteenth Amendment prescribed a penalty for states which denied the vote to persons over twenty-one, that this precluded a finding that it was a denial of equal protection to deny the vote to persons under twenty-one.[27]

However, as the majority points out, section 2 of the Fourteenth Amendment provides a specific remedy for a specific type of abuse. It does not purport otherwise to establish the age for voting. In addition, members of Congress had differing views concerning the reason that twenty-one was considered an appropriate voting age. Representative Schenck of Ohio, responding to a suggestion that representation in Congress should be based on population, suggested that it should be based on suffrage, and that suffrage should be

[27] *See* statement and testimony of Dean Louis Pollak, Yale Law School. Hearings on S.J. Res. 7 et al., before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 91st Cong., 2d Sess. 249–73 (Comm. Print 1970); letters from Professors Bickel, et al. and Casper, 116 Cong. Rec. H5648–49 (daily ed. June 17, 1970).

limited to male citizens over twenty-one years of age. He stated his reason for choosing twenty-one:

> I take twenty-one years of age because, I believe, in every State in the Union that has always been and is now the line between the adult and the minor.[28]

> [I]n every country, the age of majority, not being a thing which is settled by natural right, is to be settled according to the best exercise of discrimination on the subject, and the best consideration that is to be given to questions of expediency by those who framed the institutions of that Government.[29]

Senator Poland of Vermont considered the question of the voting age to be capable of differing answers:

> [W]e all know that many females are far better qualified to vote intelligently and wisely than many men who are allowed to vote; and the same is true of many males under twenty-one. . . . The truth is that the whole system of suffrage in any republican State is wholly artificial, founded upon its own ideas of the number and class of persons who will represent the wishes and interests of the whole people.[30]

Others during the same era attached more significance to the age limit. During the debates concerning the qualifications for suffrage in the District of Columbia, Senator Morrill of Maine remarked:

> "Manhood suffrage" to define it, is simply to state the conditions of manhood, the state

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[28] Cong. Globe, 39th Cong., 1st Sess., App. 298 (1866). But the line between adult and minor was, in his view, a line to be drawn pragmatically:

[29] *Id.*

[30] *Id.* at 2962.

> of an adult male grown to full size and strength. . . . In most nations, for purposes of war, it is a male person between the ages of eighteen and forty-five years. Among the civilians it was from fourteen to twenty-five. . . .
>
> The fatal objection to "manhood suffrage" is that the right is based on physical development, like arms bearing, while the act [of voting] itself necessarily implies intelligence, discretion, intellectual development.
>
> * * * * *
>
> The American principle favors the right of suffrage for the male citizen of full age, supposed to be based upon the law and usage that at this age he becomes free of the tutelage of family and is free to manage his own affairs.[31]

In a similar vein, Senator Bayard of Delaware remarked during the debates over the Fifteenth Amendment:

> [T]he age is fixed arbitrarily at twenty-one, founded no doubt upon the principle that the human passions develop more rapidly than the intellectual and the reflecting powers, and that the control over the passions is not sufficient under the age of twenty-one to trust men with the exercise of the franchise. The result would be personal conflicts and riots at elections, becoming so general that to avoid anarchy the people would accept despotism. There are boys of eighteen who might be safely entrusted with suffrage, but no tribunal could be possibly organized to determine fairly on individual exceptions. . . . To use the slang of the day, the community has not yet been educated up to the idea because some boys of eighteen may

[31] Cong. Globe, 39th Cong., 2d Sess. 40 (1866).

> have more intellect and self-control than the average man of forty, and be quite competent to exercise the franchise of voting, that therefore all boys of eighteen ought to enjoy the franchise. But in this age of progress . . . no prediction can be made as to when this question will seriously arise.[32]

Other quotations, on both sides of the question, can be found.[33] When they are totaled, however, they do not definitely answer the question of the proper age for voting any more than other remarks indicate conclusively whether or not the Fourteenth Amendment was intended to apply to voting at all.

The usual caveats concerning the use of legislative history in statutory interpretation [34] apply with similar force to attempts to interpret constitutional amendments. However, there is a difference in that the views of the ratifying states as to the meaning of the Amendment may not correspond to the views of the people who drafted and debated the provision in Congress and because their approval is necessary to its adoption their intention is also material.[35] The states would be inclined to make independent judgments concerning the meaning of the Amendment based on the language of the Amendment itself. The current meaning of the Amendment must be determined, therefore, from the words themselves, their origin and

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[32] Cong. Globe, 40th Cong., 3d Sess., App. 168 (1869).

[33] *See, e.g.*, Cong. Globe, 39th Cong., 2d Sess. 43 (1866) (Remarks of Senator Willy of West Virginia).

[34] *See* A. Bickel, *Politics and the Warren Court* 212 (1965). *See generally*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

[35] This seems to have been recognized by the drafters of the Fourteenth Amendment themselves. See the remarks of Rep. Stevens, Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

"line of growth" [36] as much as, if not more than, from the intentions of the men who wrote them as those intentions are revealed in congressional debates.

Not only is there no showing, therefore, that the Fourteenth Amendment precludes a congressional enactment setting the voting age at eighteen, but there is abundant evidence that Congress had the power to interpret that Amendment for itself and to pass legislation in keeping with its interpretation.[37] This it has done here and it is my opinion that in doing so it has acted within its constitutional power as presently interpreted by the Supreme Court.[38]

GEORGE E. MACKINNON,
Circuit Judge.

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[36] *Gompers* v. *United States*, 233 U.S. 604, 610 (1914) (per Holmes, J.). *See also Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669 (1966) ("Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.").

[37] The results might be subject to different treatment in the courts, depending upon the provision of the Constitution under which Congress acts; but the necessity for a member of Congress, or Congress itself, to interpret the Constitution occurs almost daily. That duty arises with respect to every piece of legislation. *See generally* D. MORGAN, CONGRESS AND THE CONSTITUTION (1966).

[38] I see no necessity for discussing the extreme suggestion that Congress might prohibit states from denying the vote to those over 12, over 5 and so forth or that Congress could decide that age is an impermissible basis of classification for voting purposes. *See* majority opinion at 35. Rebutting such arguments emphasizes them beyond their merits.

APPENDIX B

VOTING RIGHTS ACT AMENDMENTS OF 1970, P.L. 91-285, 84 STAT. 314

An Act

To extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Voting Rights Act Amendments of 1970".

* * * * *

"SEC. 6. The Voting Rights Act of 1965 (79 Stat. 437, 42 USC 1973 *et seq.*) is amended by adding at the end thereof the following new titles:

* * * * *

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view

of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"SEC. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"SEC. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Approved June 22, 1970.

APPENDIX C

ARTICLE II, CONSTITUTION OF OREGON (1968)

§ 2. Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 21 years of age or older * * *.

* * * * * * *

ARTICLE VI, CONSTITUTION OF TEXAS

§ 1. [as amended, 1954]. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§ 2. [as amended, 1968]. Qualified elector; registration; absentee voting

Sec. 2. Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitu-

tion in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01. Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Art. 5.02 [as amended, 1968]. Qualification and requirements for voting

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such person offers to vote, and who shall have registered as a voter, shall be deemed a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 43 Original

STATE OF OREGON

v.

JOHN N. MITCHELL, Attorney General of the United States

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE, AMICUS CURIAE

INTEREST OF THE AMICUS

The Democratic National Committee ("DNC") is an agency of the National Democratic Party, established at each national convention, which has the obligation and authority to promote the principles and programs of the Democratic Party. As the representative of one of the two major political parties, the DNC is vitally interested in the preservation and strengthening of the nation's political processes. An informed, educated electorate composed of all those who are subject to the obligations of citizenship is essential to the proper functioning of our democratic form of government. The DNC believes that extension of the franchise to those citizens over 18 years of age and not yet 21 will infuse new vitality into the political life of the country, will help cure the pervasive sense of alienation and powerlessness affecting the nation's youth and will end a long-standing discrimination between citizens.

STATUTE INVOLVED

Title III of the Voting Rights Act Amendments of 1970, Public Law 91-285, provides in part as follows:

DECLARATION AND FINDINGS

Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

STATEMENT OF THE CASE

Expansion of the franchise is not new to American political life. This country has from its inception repudiated religious and property tests. The Fifteenth Amendment struck down racial limitations, and the Seventeenth required direct election of Senators. The Nineteenth Amendment enfranchised women, and the Twenty-third Amendment gave the vote in presidential elections to residents of the District of Columbia. The Twenty-fourth Amendment, together with this Court's decision in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), ended state poll taxes. This course of action has "translated into reality the democratic ideals of the Declaration of Independence,"[1] and with each expansion of the franchise "new vitality has been infused into the lifestream of the Nation, and America has emerged the richer."[2] Title III of the Voting Rights Act Amendments, which prohibits the denial of the right to vote on account of age if the person in question is 18 or older, is but the latest step in this progression. The effect of the statute will be to increase by nearly 10 million people those who may exercise the franchise in 48 states and the District of Columbia, an increase of 8%.[3]

Congress did not act precipitously. In fact, the matter was considered as early as 1942 in the form of a proposed

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[1] Congressman Albert, 116 CONG. REC. 5645 (daily ed. June 17, 1970). Unless otherwise indicated, all Congressional Record citations will be to the daily edition.

[2] Message of President Lyndon B. Johnson to the Congress of the United States on lowering the Voting Age, 1968 CQ Almanac 87-A.

[3] See 116 CONG. REC. 3488. Georgia and Kentucky already allow 18-year-olds to vote. Alaska and Hawaii have set the voting age at 19 and 20, respectively.

constitutional amendment sponsored by Senator Vandenberg.[4] Thus, Congress was able to draw upon the wisdom it had gained over many years, and much of its experience is spread over the pages of the Congressional Record and the Senate Hearings.[5]

Moreover, Congress did not merely conclude that, all factors considered, 18 was preferable to 21 as a minimum voting age. Instead, Congress concluded, as the legislative findings indicate, that the denial of the vote to those over 18 on account of age bears no reasonable relationship to any compelling state interest and therefore constitutes a denial of due process and equal protection of the laws. The question of the constitutionality of proceeding by statute was extensively debated and the guidance of leading authorities on the Constitution was obtained. *See, e.g.*, 116 CONG. REC. 3502-03; 3511-15 (March 11, 1970). After much deliberation, Congress came to the conclusion that the denial of the franchise to those over 18 and not yet 21 was an invidious discrimination at least equal in scope and effect to that dealt with by statute in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

The constitutionality of Title III was sustained in a recent decision of a unanimous three-judge District Court, *Christopher* v. *Mitchell*, Civ. No. 1862-70 (D.D.C. Oct. 2, 1970). That court considered and rejected claims identical to those presented to this Court.

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[4] See Message of President Lyndon B. Johnson, *supra*, note 2.

[5] This record includes extensive floor debate, the Senate Hearings on the Voting Rights Amendments, and hearings before Senator Bayh's subcommittee on Constitutional Amendments, which "provided the basic record on which the Senate" acted. 116 CONG. REC. 3715 (March 13, 1970) (Senator Mansfield).

ARGUMENT

I. Legislative History.

The legislative history has been exhaustively discussed in other briefs before the Court, and it will not be repeated here. The DNC would, however, call the Court's attention to the most important factors influencing the Congress.

A. *Improved Education and the Influence of the Mass Media Make Young People Better Informed on Public Issues Than Earlier Generations*

One theme reoccurring throughout the debate is the fact that the current generation is far better educated than any prior generation. Seventy-eight percent of those in the 18-20 age group are high school graduates and forty-six percent are already enrolled in college. 116 CONG. REC. 3584 (March 12, 1970) (Senator Mondale). Those in the 18-20 age group have a higher average grade level attained than the country at large.[6]

A second theme found in the Congressional debate is the fact that radio and television bring news of public events to all our citizens with an impact and immediacy impossible only twenty years ago. Thus, citizens 18-20, like all other citizens, are far better informed of public issues than their counterparts of the recent past. *See, e.g.*, 116 CONG. REC. 3516 (March 11, 1970) (Senator Ellender).

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[6] Those 18 to 19 have an average grade level attainment of 12.2 years. Those 20-21 have an average attainment of 12.7. Those 21 and over have an attainment of 12.2, while those 25 and over have an average attainment of only 12.1. The older voters of the country have a much lower average attainment. Those 55 to 64 have an average attainment of 10.5, while those 65-74 have only 8.8 years. *Educational Attainment*, Bureau of the Census, Series p-20 No. 194 (March 1969).

B. *Youth Has Proven Its Competence in Dealing With Political Issues*

Congress found that in the four states which allow voting prior to 21, the experience is uniformly good. *See, e.g.*, 116 CONG. REC. 5668 (June 17, 1970) (Representative Burlison); 116 CONG. REC. 3514 (March 11, 1970) (Senator Cooper). Many members of Congress who have had personal experience in dealing with disenfranchised young people expressed their admiration for the maturity and judgment they have shown. *See, e.g.*, 116 CONG. REC. 3584 (March 12, 1970) (Senator Hatfield). The experience of Congressmen in this regard is especially noteworthy because the House vote took place shortly after the influx of students to Washington to confer with their Congressmen about the Cambodian incursion. *See, e.g.*, 116 CONG. REC. 5656-57 (June 17, 1970) (Representative Podell).

C. *No Compelling State Interest Is Served by the 21-Year Age Limit*

Congress realized that the 21-year-old age requirement for voting was an archaic tradition, rather than a conscious decision based on a well-thought-out state policy. Indeed, it was suggested that the age of 21 was originally set as the mark of manhood because at that age a man was strong enough to wear armor. *See, e.g.*, 116 CONG. REC. 5640 (June 17, 1970) (Representative Matsunaga). Whatever the original validity of 21 as a benchmark, Dr. Margaret Mead's testimony before Senator Bayh's subcommittee indicated that within the last 100 years, "the age of maturing young people has lessened by three years." 116 CONG. REC. 3510 (March 11, 1970) (Senator Bayh). Thus, from a scientific point of view, the Congress was justified in advancing the age of voting to 18.

Moreover, Congress found that young people were educated in the rights of citizenship and were interested in voting at 18. The denial of the vote at that point contributed to the unfortunate high rate of voter apathy in this country. See 116 Cong. Rec. 3584 (March 12, 1970) (Senator Mondale). Further, Congress was aware that other countries, including Great Britain, have lowered the voting age to 18 in recent years. 116 Cong. Rec. 3519 (March 11, 1970).

D. *The Major Obligations of Citizenship Are Imposed at 18*

The earlier maturation testified to by Dr. Mead has been recognized by society in many areas, especially those involving the more burdensome obligations of citizenship. Young men are eligible for the draft at 18. Indeed, almost half of those Americans who have given their lives in Vietnam have been in the 18-20 age group. 116 Cong. Rec. 3499 (March 11, 1970) (Senator Cook). In all states except California, young people are subject to adult criminal sanctions at the age of 18. 116 Cong. Rec. 3518 (March 11, 1970) (Senator Randolph). Young people who are members of the work force are subject to taxation. According to Department of Labor statistics, over 66% of the men and nearly 50% of the women aged 18 and 19 were in the labor force as of May, 1970. *Employment and Earnings*, Vol. 16, No. 12, table A-3 (1970). A large portion of these people were already married and raising families. 116 Cong. Rec. 3492 (March 11, 1970) (Senator Goldwater).

E. *Denial of the Vote to 18-Year-Olds Constitutes Discrimination and Results in the Alienation of Our Youth*

Despite their demonstrated maturity, these young people have not been given the most fundamental right in our political system, the right to vote. Congress was mindful that these people were being taxed without having a voice in the way the money should be spent—an evil which was largely responsible for the American Revolution (*See* 116 CONG. REC. 5673)—and were called upon to give their lives in support of a policy which they had no opportunity to influence. Congress perceived that the result of imposing the obligations of citizenship upon young people without giving them a voice in government has been to increase dangerously their sense of alienation, frustration, powerlessness, and cynical distrust of the established political system.

The extension of the franchise to these young people was viewed by the Congress as a significant step in restoring their faith in the system, curtailing the tendency to resort to violence, and helping to bring about a reconciliation of generations. Thus, Prof. Paul Freund observed, 116 CONG. REC. 3481:

> Not only the younger generation, but all of us, will be the better if the vote is conferred below the age of twenty-one; we need to channel the idealism, honesty, and openhearted sympathies of these young men and women, and their informed judgments, into responsible political influences.

Indeed, at least one Congressman viewed the question of alienation as a matter going to the very survival of the country. *See* 116 CONG. REC. 5665 (June 17, 1970) (Representative Preyer).

The themes discussed above were aptly summarized in the remarks of Representative Tunney:

> In my opinion, we in the Congress can take no more effective step toward bringing the disenchanted and disenfranchised younger members of our country within the system than by allowing them the opportunity to vote. I feel strongly that if at 18 we can ask youths to die in a war that is not of their making; if we can demand that they pay taxes to support policies in which they have played no role; if society treats them as adults when they commit a crime; if they can marry; if they can assume all the fiscal responsibilities of an adult, all of the assets and liabilities, then they certainly ought to be allowed the right to vote. 116 Cong. Rec. 5667 (June 17, 1970).

In light of these facts, Congress concluded that the states have no compelling interests to be served in setting the voting age at 21. While discrimination between those over and under 21 was found arbitrary, Congress saw logic in a discrimination between those over and under 18. The point is made by Senator Randolph, 116 Cong. Rec. 3519 (March 11, 1970):

> Eighteen is the logical voting age in America. It signals the end and the beginning of many tasks. Foremost is the completion of the formal education process.

The end of high school is indeed an end and a beginning. It signals the end of dependence on the family and the beginning of independence through a full-time job, perhaps a family of one's own, and higher education, often at some distance from home.

II. State Limitations on the Franchise Are Limited by the Fourteenth Amendment Guarantee of Due Process and Equal Protection of the Laws.

This Court, in *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964), stated:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.

The vote is one of our most fundamental rights because it is the "preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). Limitations upon it must therefore be "carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Indeed, when a state statute limiting the franchise is challenged, no presumption of constitutionality is afforded it. The usual presumption is "based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as a basis for presuming constitutionality." *Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969).

III. Title III Is Appropriate Legislation Under Section 5 of the Fourteenth Amendment.

Given the standard of review discussed above, there is serious question whether the requirement that a citizen be 21 before he may vote is sufficiently rational under today's conditions to withstand challenge under the Fourteenth Amendment. That question, however, need not be faced because Congress has spoken on the issue, acting under § 5

Amendment. As this Court stated in
an, 384 U.S. 641, 651 (1966):

of the Fourteenth, § 5 is a positive grant of legislative
Katzenbach v. *Mo*g Congress to exercise its discretion
whether and what legislation is needed
Correctly vie uarantees of the Fourteenth Amend-
power autho
in determinin
to secure th *Morgan*, this Court dealt with § 4(e)
ment. Act of 1965. That Section provided, in

In *Katzenbach* to Ricans residing in New York who
of the Voting Rig th-grade education in Puerto Rican
substance, that Hassroom language was Spanish could
had attained a ght to vote in New York solely because
schools where th in English. In an opinion by Mr. Jus-
not be denied the court sustained the statute on grounds
they lacked litera oad congressional power to legislate
tice Brennan, thi which the Fourteenth Amendment was
which confirm a
against the evils by specifically rejecting the argument
aimed. ot legislate under § 5 of the Fourteenth

The Court beg the state statute which is thereby abro-
that Congress ma iolation of the Fourteenth Amendment.
Amendment unle
gated is in itself
The Court state of § 5 that would require a judicial de-

> A constructi t the enforcement of the state law pre-
> termination gress violated the Amendment, as a
> cluded by C staining the congressional enactment,
> condition of ate both congressional resourcefulness
> would depr nal responsibility for implementing the
> and congres t would confine the legislative power in
> Amendment the insignificant role of abrogating only
> this context s that the judicial branch was prepared
> those state l constitutional, or of merely informing
> to adjudge

the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. 384 U.S. at 648-49.

The Court concluded that § 4(e) could be upheld on either of two alternative theories. First, the Court held that § 4(e) might be regarded as appropriate legislation "to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement." 384 U.S. at 652.

Secondly, the Court was willing to sustain the statute as a congressional determination that a statute discriminating between those literate in English and those literate in Spanish was, under the circumstances, an invidious discrimination violative of the Fourteenth Amendment's guarantee of equal protection of the laws. The Court stated that because Congress "brought a specially-informed legislative competence" to this subject, "it is enough that we perceive a basis upon which Congress might predicate a judgment" to hold the statute constitutional.

The applicability of the *Morgan* decision to the case now before the Court is obvious. Several points, however, should be stressed.

First, *Morgan* involved the rights of the states to set voter qualifications in the same way as this case. The two cases cannot be distinguished in this regard. Secondly, the legislative findings upon which the *Morgan* decision rested were far less compelling than the legislative record in this case. Third, there can be no doubt that the members of Congress were aware of the necessity of finding an invidious discrimination between 18-20 year olds and other voters, as

opposed to a mere preference for the lower age. Congress acting with reason and due consideration made the finding of discrimination.

A. *The Legislation Is Appropriate to Secure the Rights of the 18-20 Class to Equal Treatment*

As noted above the majority in *Morgan* found the statute sustainable because it might be viewed as necessary to secure the rights of the Puerto Rican community in New York to equal treatment in terms of municipal services. The denial of equal access to municipal services would clearly be a violation of the Fourteenth Amendment, and it was within Congress' power to provide additional voting power as a remedy. This portion of the opinion does no more than follow the rationale of *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), that Congress may take remedial or prophylactic action to prevent violation of Fourteenth Amendment rights. As such, it is not a departure from established principles. *See*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUPREME COURT REVIEW, 81, 101-03; *Christopher* v. *Mitchell*, Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 19.

Title III of the Voting Rights Act Amendments may be sustained on this ground. Congress was surely aware that "enhanced political power will be helpful in gaining nondiscriminatory treatment" (384 U.S. at 652) for the young people of America in those areas where legislative programs are of particular interest to them: the draft, foreign policy (especially as it regards the use of military personnel), education, manpower programs and taxation. *See*, 116 CONG. REC. 3486 (March 11, 1970) (Senator Kennedy). Indeed, the statute itself refers to the special burden imposed on 18-20 year olds in the area of national defense.

In *Morgan*, there was no legislative material upon which findings of actual discriminatory treatment in municipal services could be rested. The majority appeared willing to assume those facts necessary to sustain the statute, while the dissent would not. In this case, however, the legislative record contains facts showing an inordinate burden being placed upon people in the 18-20 age group to serve in the military, and an even greater disparity in the burden of casualties. Over 950,000 of the 3.5 million men in our Armed Forces are under 21. And of the 40,028 men killed in Vietnam as of December, 1969, an astounding 19,202 were too young to vote. 116 CONG. REC. 3499 (March 11, 1970).

B. *The Legislation Is Appropriate to Deal With the Sense of Alienation Found in Today's Youth*

A denial of the right to vote has effects which go far beyond the direct result of lessened political influence. The very fact that a person or class believes itself unfairly deprived of access to the political process may well cause deepseated feelings of alienation and powerlessness. The group may reject the legitimacy of the established system because the system has not allowed it to participate in the decision-making process. This feeling of alienation, caused by an apparent or real denial of due process and equal protection, exists among today's youth. An evil so closely related to a denial of equal protection of the laws must be amenable to congressional action under § 5 of the Fourteenth Amendment.

Congress found that the alienation of our youth was caused in large part by the denial to our youth of a voice in decisions which affect them so greatly:

> There is an ominous danger to a democracy if it disenfranchises citizens who are capable. Because, by prohibiting the normal exercise of citizenship in the vote, frustrations arise which can lead to dangerous alternatives in dissent. 116 CONG. REC. 5654 (June 17, 1970) (Representative Bennett).

Congress properly viewed this alienation, and the violence which sometimes accompanies it, as matters of the greatest concern. Indeed, the salutary effect of lowering the voting age in alleviating alienation was a most important factor in the passage of Title III.

> Furthermore, by extending the right to vote [to] our 18-, 19-, and 20-year-olds, we would be showing visible recognition of the national crisis in confidence in our institutions and system among our youth. We would be encouraging and strengthening the position of those who want to work within the system rather than against it. 116 CONG. REC. 5640 (June 17, 1970) (Representative Matsunaga).

See also, 116 CONG. REC. at 3496 (Senator Yarborough); 3497 (Senator Hartke); 3500 (Senator Young); 3510 (Senator Bayh); 3524 (Report of Representative Brock on his Tour of Campuses) (March 11, 1970).

Thus, there is ample basis in the legislative history for Title III to be justified as a remedial and prophylactic measure aimed both at securing the rights of 18-20 year olds against discriminatory treatment and at remedying the sense of alienation caused by the perception that they are denied equal protection of the laws when they are denied the vote.[7]

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[7] Although this argument has not been made by the Solicitor General, it is clear that Title III may be sustained on this theory, and the Court need not consider what commentators consider the

C. *Congress Had an Adequate Basis for Finding the 21-Year Requirement to Be a Violation of the Fourteenth Amendment*

The second branch of the Court's opinion in the *Morgan* case rests upon the proposition that Congress, in the exercise of "a specially informed legislative competence" (384 U.S. at 656) might find a state statute an invidious discrimination in violation of the equal protection clause. The Court should honor such a finding if it can "perceive a basis upon which Congress might predicate" such a judgment, even if it would not have made such a finding absent legislative guidance. *Id.*

The evidence of discrimination between those citizens 18 through 20 and those 21 and over upon which Congress made a judgment of discrimination is summarized above at pp. 5-9 and is exhaustively discussed in other briefs before the Court. This information is far more detailed than that involved in the *Morgan* case and provides "a basis" upon which Congress might ground its finding of discrimination. The congressional finding of discrimination is corroborated by the fact that the young people involved believe they are denied equal protection of the laws, and as a result have become dangerously alienated from our political system.

Moreover, the legislative history supporting the Voting Rights Act Amendments of 1970 is so extensive that it should satisfy the requirements even of the two dissenters in the *Morgan* case, Justices Harlan and Stewart. They disagreed with the majority on two points. First, they

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more far reaching alternative theory presented by the *Morgan* decision. *See* Burt, *supra*, at 103; Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 103-06 (1966).

would require a "rational" or "reasonable" basis for the statute, rather than the majority's test of merely perceiving "a basis." Secondly, the majority in *Morgan* appeared willing to assume facts necessary to sustain the statute in the absence of a factual record in the legislative history while the dissenters would require the legislative history to indicate the facts upon which Congress acted. In this case, the factual basis for congressional action is clear on the face of the record, and provides a rational and reasonable basis for the statute. Indeed, the District of Columbia Court believed the issue of rationality to be so clear that detailed elaboration of reasons was unnecessary, *Christopher* v. *Mitchell*, Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 34.

D. *Title III Is Consistent With the Constitution*

The State of Texas has suggested that the constitutionality of Title III is not governed by the *Morgan* decision because it is not consistent with the letter and spirit of the Constitution. 384 U.S. at 656. In this regard, Texas relies primarily upon § 2 of the Fourteenth Amendment which provides that a state's representation in Congress shall be reduced where the right to vote "is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . ." It is suggested that this language constitutes an affirmative sanction of the 21-year-old voting age.

This is simply not the case. First, the reference to age 21 is merely a codification of the existing practice at the time. *See* 116 CONG. REC. 7279 (May 18, 1970) (Letters of Professor Kaufman of Harvard Law School and Professor

O'Reilly of Boston College Law School); *Chrisiopher v. Mitchell,* Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 56 (MacKinnon, J., concurring).

While § 2 indicates that a voting age of 21 was not considered an invidious discrimination when the Fourteenth Amendment was ratified, it is not dispositive under today's changed circumstances. Not only have the relevant facts changed in the century since the passage of the Fourteenth Amendment, but the law as well.

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 669 (1966) (Emphasis in the original).

IV. The *Morgan* Decision Is Sound and Should Be Reaffirmed.

The *Morgan* decision is in the mainstream of current constitutional development. It was foreshadowed by Mr. Justice Black's dissenting opinion in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 679 (1966),[8] in the following language:

> I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the laws.

Morgan was also anticipated by Judge Wisdom in *United States* v. *Louisiana,* 225 F. Supp. 353, 360-61 (E.D. La.

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[8] Justices Harlan and Stewart intimated no views on the question, and left it open. 383 U.S. at 680-81.

1963), *aff'd*, 380 U.S. 145 (1965). Judge Wisdom held that Congress had full authority "to enact the Civil Rights Act or other appropriate legislation (including registration), under Article I § 4, and to protect the integrity of the electoral process under the 14th and 15th Amendment."

The *Morgan* decision is harmonious with the approach of this Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), as well as *Miranda* v. *Arizona*, 384 U.S. 436, 490 (1966), and *United States* v. *Wade*, 388 U.S. 218, 239 (1967) where the Court invited legislative action which might use the Congress' greater fact-finding abilities to provide alternative and superior schemes of protecting the rights in question. Moreover, the power of Congress under § 5 to prohibit action which is beyond the reach of the Court under § 1 alone was suggested in *United States* v. *Guest*, 383 U.S. 745 (1966), where a majority of the Court ruled that Congress could prohibit individual action which might interfere with rights secured by the Fourteenth Amendment against state action.

V. The *Morgan* Decision Is a Doctrine of Restraint and Does Not Give Congress Unwarranted Powers.

As Professor Cox has pointed out, the decision in *Katzenbach* v. *Morgan* constitutes an invitation to Congress to take the lead in fulfilling the promise of the Fourteenth Amendment.[9] If Congress takes up the challenge, the Court will be called upon less frequently to take the lead in this area. Moreover, the *Morgan* doctrine is an invitation to congressional action in areas which increasingly call for the sort of line drawing which Congress is best equipped to carry out. For example, while the Court might find that

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[9] *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

the line between voters over 21 and under 21 is totally arbitrary, it would have great difficulty in setting a more appropriate dividing line. Congress, however, is institutionally better suited to set a new line which, although containing the arbitrariness which is implicit in any drawing of lines, is far fairer than the present line. *See generally*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUPREME COURT REVIEW 81, 112-14.

The *Morgan* decision does not constitute an unlimited grant of power to Congress. First, it is limited to "reform" measures, such as the statute now before the Court, which "enforce" the provisions of § 1 of the Amendment. *Morgan* is not applicable, as the Court made clear in footnote 10, to legislation which seeks to reverse Court decisions defining the limits of equal protection. *See generally Christopher* v. *Mitchell*, Civ. No. 1862-70 (D.D.C. Oct. 2, 1970) slip opinion at 21-24.

It is true that *Morgan*, together with *South Carolina* v. *Katzenbach* and *United States* v. *Guest*, confirms a broad congressional power to legislate in areas traditionally subject to regulation by the states. That power, however, like the congressional power to legislate pursuant to the commerce clause, is limited by the restraint and good sense of the Congress. Congress' record in the commerce area has been one of impressive deference to state interests, despite the fact that our economy is becoming more and more a national one. There is no reason to believe that a similar deference will not be shown to state power under § 5 as well.[10]

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[10] Indeed, the decisions on the breadth of the commerce power are such that voting legislation itself might, in large part, be based upon the commerce power. Congress might find, for example, that relocation of industries in certain areas of the country is hampered

In any event, the interests of federalism will have the same source of protection from unnecessary encroachments under § 5 of the Fourteenth Amendment as they have against congressional action under the commerce power:

> The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections . . . . They are the restraints on which the people must often rely solely, in all representative governments. *Gibbons* v. *Ogden*, 22 U.S. 1, 197 (1894).

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by the fears of employees that if they move, they will lose their right to vote for the not insubstantial period required by residency tests. Similar impediments to relocation of employees might arise because of differences in literacy tests or age requirements. This Court, in affirming civil rights legislation under the commerce clause has indicated exceedingly broad deference to congressional findings of this sort. *See, e.g., Katzenbach* v. *McClung*, 379 U.S. 294 (1964). Thus *Morgan* adds little to the power of Congress to reach matters hitherto regulated by the states.

CONCLUSION

For the reasons stated above, the Democratic National Committee respectfully requests this Court to uphold the constitutionality of Title III of the Voting Rights Act Amendments of 1970 and to deny the relief requested by the State of Oregon. To rule otherwise would strike down the major effort of Congress to deal responsibly with the troubling issue of alienation of today's youth.

Respectfully submitted,

JOSEPH A. CALIFANO, JR.
CLIFFORD L. ALEXANDER, JR.
KENNETH A. LETZLER
1229 19th Street, N.W.
Washington, D.C.

Attorneys for the Democratic National Committee

Of Counsel:

ARNOLD & PORTER
Washington, D.C.

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SUPREME COURT OF THE UNITED STATES

Nos. 43 Original, 44 Original, 46 Original and 47 Original

STATE OF OREGON,
Plaintiff,

vs.

JOHN N. MITCHELL, Attorney General of the United States.

STATE OF TEXAS,
Plaintiff,

vs.

JOHN N. MITCHELL, Attorney General of the United States.

UNITED STATES,
Plaintiff,

vs.

STATE OF ARIZONA.

UNITED STATES,
Plaintiff,

vs.

STATE OF IDAHO.

BRIEF ON THE MERITS BY THE STATE OF MISSISSIPPI AS AMICUS CURIAE AND REQUEST FOR ORAL ARGUMENT

STATEMENT

This brief is submitted by A. F. Summer, Attorney General for the State of Mississippi on behalf of the State

of Mississippi, and in support of all other States having a similar interest in the outcome of the cases styled as heretofore set out. *These States are engaged in a struggle for survival as living instruments of government.* The Order of the Chief Justice of the United States as to these causes, dated August 25, 1970, provides that as there is an apparent willingness of all parties to expedite the proceedings to clarify a matter of paramount interest to the people of the United States of America and to the respective States, that all briefs should be filed by October 12, 1970. As two States are plaintiffs in this litigation and as two States are defendants, the State of Mississippi assumes that the Chief Justice has authorized any other States that might want to have their position recorded and their views considered by the Supreme Court of the United States to have until October 12, 1970, to file their briefs. This brief is, therefore, filed under the provisions of the Rules of the Supreme Court of the United States (Rule 42, sub-section 4).

It is the position of the State of Mississippi that the 1965 Voting Act (Pub. L. 89-110, hereinafter referred to as the 1965 Act) is primarily responsible for a situation that could lead to a decision by this Court in this case that would severely affect all of the States of the United States of America and would immediately create a totally centralized federal government with absolutely no powers delegated to or reserved to the respective States under the Constitution of the United States. Such a decision would also result in a severe limitation on the existing power of the Supreme Court of the United States as the Court would never again be in a position to declare an act of its co-equal branch of the federal government, the United States Congress, to be unconstitutional due to the fact that the powers asserted by Congress had either been delegated or reserved to the states by not being specifically delegated to the Congress.

The President of the United States announced in June, 1970, that in his opinion, the uniform voting mandates of the act in question were unconstitutional. However, the President proceeded to sign the entire Act (Pub. L. 91-285, hereinafter referred to as the 1970 Act), trusting in the judgment of the United States Supreme Court and primarily for the purpose of enacting into law an extension of the 1965 Act.

The State of Mississippi is somewhat in the position that Attorney General Robert Kennedy said he was in during the preconvention stages of the Presidential campaign of 1964, when the President issued a statement to the press stating that no member of his Cabinet nor any person who regularly met with the Cabinet would be considered as a Vice Presidential nominee to run with the President. The Attorney General said at that time that he regretted considerably that so many nice people had been thrown overboard with him.

In all probability, had it not been for the *ex post facto* feature of the 1965 Voting Act setting November 1, 1964 as the date of the applicability of "test or device," the State of Mississippi would not be affected by the Voting Rights Act of 1965 at this time as new voting laws and constitutional amendments were passed by the Mississippi State Legislature more than two months before the 1965 Act was passed.

To illustrate the effect of the Mississippi laws that were passed in June, 1965, we quote from page 653 of the opinion of the Fifth Circuit in *U. S.* v. *Ramsey*, 353 F.2d 650 (1965), as follows:

> "Time has also been working in Mississippi, and working for good. By constitutional amendments approved overwhelmingly by her people and by legislation, Mississippi has adopted a simplified procedure

and standards, and now the only prerequisites for registration are (a) ability to read and write, (b) citizenship, age and residence, and (c) absence of felony conviction, thus eliminating the good-moral-character, the duties-of-citizenship, and the read-and-interpret requirements, which have been the engine of discrimination for so long."

The State of Mississippi, therefore, does not take the responsibility for the fact that the 1965 Voting Act extension provision for five additional years was available to be tied into the 1970 Act and thus be used as a lever to pass and to influence the President of the United States to sign a law that, in his opinion, is unconstitutional. However, as the State of Mississippi was one of the States originally singled out by the 1965 Voting Act, we feel compelled to make a vigorous effort to aid our sister States in their fight to preserve rights that are, by the Constitution, expressly delegated to said States.

As this case is similar to the case of *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), and is one "of urgent concern for the entire country," the State of Mississippi takes the position that its powers and prerogatives are equally affected along with the rights of the people of all of the other States. The State of Mississippi contends that it should be considered as an intervening party in connection with this entire litigation. However, for the purpose of clarity and brevity, the State of Mississippi, the Attorney General of the State of Mississippi, the authors of this brief and people of the State of Mississippi whose interest will be vitally affected appear here in the status of *amici curiae* and will be referred to as *amicus.*

STATEMENT OF INTEREST OF AMICUS CURIAE, AS TO JURISDICTION AND STATUTE INVOLVED

The State of Mississippi as *amicus curiae* respectfully requests the Court to permit it to adopt by reference the statement as to interest of *amici curiae* set out on pages 1 through 3 of the Brief of the Attorney General of the State of Indiana, Hon. Theodore L. Sendak, who was joined in said statement by numerous other states. The State of Mississippi would further respectfully request that the statement as to jurisdiction and statute involved as set out on page 1 of the Brief of Hon. Crawford C. Martin, Attorney General of the State of Texas, be adopted by reference for the purposes of this brief.

QUESTIONS PRESENTED

Whether or not the 1970 Act is constitutional insofar as it (1) suspends literacy voting requirements on a nationwide basis, (2) completely abolishes durational residency requirements in presidential elections, (3) requires uniform nationwide standards as to absentee registration and absentee balloting in presidential elections, and (4) reduces to 18 the minimum age for voting in all elections.

MOTION FOR ORAL ARGUMENT

Under the provisions of Rule 44 (specifically subsection 7 wherein motions for oral argument on the part of a State as *amicus curiae* are favored), the State of Mississippi respectfully moves that a portion of the oral argument in this case be afforded to the Attorney General of the State of Mississippi, or to a member of the Bar of this Court to be designated by said Attorney General. The State of Mississippi would not unduly infringe on the time of the other participants who, in all probability, will

more ably argue this case. However, due to the unique status of the State of Mississippi as to the experience that has been acquired while operating under the 1965 Act, and for the reasons set out in the Statement portion of the brief, the proposed argument could provide assistance to the Court.

Therefore, the State of Mississippi respectfully requests and moves the Court to grant to it the right to participate in the oral argument based on the grounds set forth herein.

SUMMARY OF ARGUMENT

Point I of this brief entitled "An Analysis of the Constitutional Provisions Involved Clearly Show the 1970 Act to Be Unconstitutional" shows conclusively that the clear and unambiguous wording of the Constitution itself expressly delegates to the States the power to set qualifications for electors in all elections. There is also a quotation from James Madison who is historically recognized to be the principal draftsman of the Constitution itself set out in Point I. *Amicus* submits that Point I of this brief emphasizes the fact that this Court has the choice in a matter involving a question of constitutional interpretation between the Constitution itself and the opinion of James Madison on the one side and the opinion of the proponents of the 1970 Act on the other side.

Point II of this brief is entitled "If Held to Be Constitutional, the 1970 Act Will Provide the Machinery for Abolishing the Electoral College by Vote of a Simple Majority by Both Branches of the United States Congress" and this proposition shows clearly that the 1970 Act is a part of a Machiavellian effort to eliminate the electoral college system from the American political scene.

Point III is entitled "The *Morgan* Decision Is Not Authority for Holding the 1970 Act Constitutional" and *amicus* contends that the discussion set out in this proposition shows conclusively that the *Morgan* decision is not a valid precedent for holding that §5 of Amendment Fourteen has authorized the United States Congress to preempt the field of setting voter qualifications in spite of the fact that this power was expressly delegated to the States by the Constitution. Point III clearly shows the 1970 Act to be an unconstitutional and unreasonable infringement on the right of the States to fix voter qualifications and procedures, and that the 1970 Act unduly trespasses on the legitimate prerogatives of the States and imposes a substantial administrative burden thereon.

ARGUMENT

POINT I

An Analysis of the Constitutional Provisions Involved Clearly Show the 1970 Act to Be Unconstitutional.

There are numerous specific constitutional provisions involved in this litigation, including Article I, §2, clause 1 which states as follows:

> "1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, *and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.*" (Emphasis supplied)

The Constitution clearly delegates to the States the power to set qualifications for electors with the one stipulation that these qualifications cannot be more restricted than the qualifications for voting for those holding office in the most numerous branch of the state legislatures.

An argument can be made that the authority expressly delegated to the States as set out in Article I, §2, clause 1 was only a delegation of authority in connection with election of members of the federal House of Representatives and that the Congress recaptured the right to regulate these elections through Article I, §4, clause 1, which states as follows:

> "1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing (sic) Senators.*" (Emphasis supplied)

However, this argument is not very persuasive when the language of the Seventeenth Amendment, which deals with the popular election of United States Senators, is considered in conjunction with Article I, §4, clause 1. The Seventeenth Amendment states as follows:

> "The Senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. *The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.*
>
> "When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, That the Legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by *election as the legislature may direct.*
>
> "This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution." (Emphasis supplied)

Article I, §2, clause 1 and the Seventeenth Amendment contain a clear delegation of authority to the state legislatures to set qualifications for voters in all elections. The Congress has the power to modify only the standard set by the State for the election of United States Senators and Representatives under authority of Article I, §4, clause 1. The U.S. Supreme Court in the case of *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), decided that congressional election districts in the several States must be substantially equal in population. The dissenting opinion written by Justice Harlan reviewed, from the standpoint of admitted historical accuracy, the Constitutional Convention of 1787, and dealt specifically with Article I, §2, clause 1. This opinion in footnote 15 refers to an article by James Madison as set out in *The Federalist*, No. 54, and we quote as follows:

> "It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, *so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate.*" (Court's italics)

It is extremely clear that the complete historical background as to the drafting of the Constitution uniformly shows that the state legislatures were granted the right to set the qualifications for voting, and that the U.S. Congress retained a supervisory power, more or less, as a matter of self-protection in connection with the election of United States Senators and members of the United States House of Representatives.

The Fifteenth Amendment gives Congress the power to enforce by law the right to vote, if so denied, because of race, creed or color. The Nineteenth Amendment gives Congress the power to enforce the right of women to vote,

and the relatively recent Twenty-Fourth Amendment gives Congress the power to enforce by law the right of citizens to vote for President, Vice President or U.S. Senator or Representative without being required to pay poll tax or any other tax. *If the Congress was given the power by §5 of the Fourteenth Amendment to constitutionally enact the 1970 Act, there could have been no reason for the adoption of the later amendments.*

It is quite apparent from the amendments listed above that a majority of the Congress has never, prior to this time, taken the position that it has the right to set voter qualifications in the individual states without a constitutional amendment.

Article II, §1, clause 2 of the Constitution states, in part, as follows:

> "2. Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors, * * *". (Emphasis supplied)

Amicus contends that it would create a difficult situation if this Court were to decide that some portions of the 1970 Act are constitutional, but that the provisions of the 1970 Act dealing with special elections for United States Senators and the manner of selecting Presidential electors are delegated powers and are exclusive powers of the States.

This Court has the authority to insist that in matters involving our dual system of government, everyone must play by the "rules of the game." What can possibly be wrong with resolving the matter of 18, 19 and 20-year old citizens acquiring the right to vote under the "rules of the game" as written in the Constitution?

This procedure would require young people in this country who believe strongly that members of this partic-

ular age group should vote to work within the system to encourage their congressmen to recommend a constitutional amendment by a two-thirds vote of both Houses of Congress to the state legislature. These interested citizens would then have an opportunity to encourage their state legislators to pass a resolution ratifying the constitutional amendment. In the intervening time, young citizens and their allies could encourage their state legislators in the individual states to adopt this voting procedure even prior to the ratification of the constitutional amendment. *Amicus* submits that it would be much sounder procedure to encourage the young citizens of the country to actively participate and take pride in reaching an obtainable result rather than to give this result to these citizens in a manner that violates the spirit and the letter of the Constitution.

POINT II

If Held to Be Constitutional, the 1970 Act Will Provide the Machinery for Abolishing the Electoral College by Vote of a Simple Majority by Both Branches of the United States Congress.

Consideration should be given to the fact that by setting uniform national voting standards, the Congress can assert the power to abolish the electoral college by a law passed by a simple majority of both Houses of Congress. It will be argued by proponents of the 1970 Act that this Act gives Congress no authority to simply pass a law changing the electoral college system in order to use a straight popular vote system for the election of the President and the Vice President. However, if Congress can pass a law setting national voting standards in all elections in clear violation of the fact that the Constitution itself delegates this power to the state legislatures, an argument can be made that this Court will be required by

the decision that it might make in this case to hold that §5 of the Fourteenth Amendment authorizes Congress to repeal the electoral college system. It would be a very simple matter to argue that the electoral college system as now administered by the states does not afford all of the voters in the United States equal protection or due process.

To be fair to all of the people represented herein, *amicus* admits that there has always been substantial support in the State of Mississippi for the abolition of the electoral college. Many political experts have taken the position that the electoral college procedure has, in our recent history, worked entirely to the advantage of minority groups in the large states that tend to vote a block vote in Presidential elections. As we all know, if a Presidential candidate carries by only one popular vote a State with a very large electoral vote, he will receive the entire electoral vote of that State. Many observers have long felt that minority block voting in the large States has brought about a political situation in this country where our two national parties have, based on this very practical consideration, given paramount consideration to the interest of such groups as opposed to the interest of the voters in the relatively small southern states. For example, we quote from Theodore White's book, *The Making of the President* 1960, pgs. 236-237 as follows:

> "And the leadership of the Negroes, like the leadership of so many minorities in the great cities of the United States, was to exert its *electoral strength.* For the Northern cities of the United States, commanding the *electoral votes necessary to make an American President,* have for generations provided a leverage on American power to shape and alter the world itself." (Emphasis supplied)

In spite of the considerations set out hereinabove, *amicus* will not urge this Court to declare constitutional a law that on its face purports to be for one purpose when in reality there can be little doubt that the primary purpose is to abolish the electoral college system. If the provisions of the 1970 Act are carefully analyzed, they amount to a uniform national voting standard consisting of (1) a uniform age requirement, (2) a uniform requirement for no-literacy test, without regard to the fairness with which said test had been administered in the past and in spite of the holding in the *Lassiter* case, (3) a uniform residential requirement for Presidential elections only, and (4) a uniform absentee ballot procedure for Presidential elections only.

It would be extremely difficult for a student of both the law and politics to avoid reaching the conclusion that if the aid and assistance of this Court can be secured, the law in question is for the purpose of setting up uniform voter qualifications throughout all fifty states with the design and purpose of abolishing the electoral college system by a simple majority vote of both Houses of the Congress. *Amicus* is convinced that this Court will not be misled in this case and will assert its power to protect all of the people of the United States from the implementation of a scheme designed to amend the Constitution by a simple act of Congress.

For the purpose of abolishing the electoral college, the action of the Congress, by passing the 1970 Act, is, to some degree, rational but is extremely Machiavellian. From a standpoint of good government, it is a totally irrational and an unwarranted interference with powers expressly delegated to the states.

We quote Theodore White again, this time from *The Making of the President* 1968, p. 407 as follows:

"To approve the theory of assembly-of-the-whole as a way of electing Presidents of the United States is *to be so unaware of present reality as to approach insanity.*"

"There is, to begin with, the need to recognize that voting qualifications differ in every state. Four states permit citizens to vote under the age of 21—Georgia and Kentucky at 18, Alaska at 19, Hawaii at 20—the other forty-six do not. By altering its age laws to 18, or to 16, or to 14, any state can increase its proportion of the whole vote at will; it can also do so by altering its laws so as to include the large numbers of criminals, convicts, mentally incompetent now all variously excluded. Direct, national, one-man-one-vote elections would require a national election law establishing national qualifications and national registration in every one of the 3,130 counties of the United States.

"But it requires more than that—it requires national surveillance of each of the approximately 167,000 voting precincts of the United States. And no national surveillance can work without the establishment of a national police system. Those who report elections know, alas, that the mores and morality of vote-counting vary from state to state. * * *

"The present Federal system compartmentalizes voting in the United States by states; the votes of honest states are not balanced off or out-balanced by dishonest counting in other states; contagion of vote-stealing is limited. If all the 68,000,000 votes of 1960 and all the 73,000,000 votes of 1968 had been cast in one great national pool, then the tiny margins of victory in both elections would have evaporated. Each candidate would, necessarily, have had to call for a recount, and recounts would have continued, nation-

wide, for months. Vote-stealers in a dozen states would have matched crafts on the level of history; and, so slim was the margin, we might yet be waiting for the final results of both elections. And no practical proposal has yet been made to establish either national qualifications, national registration or, above all, national surveillance of counting." (Emphasis supplied)

POINT III

The Morgan Decision Is Not Authority for Holding the 1970 Act Constitutional.

The case of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), dealt with the constitutionality of §4(e) of the Voting Act of 1965. The 1965 Act provides that no person who has successfully completed the sixth primary grade in a public school in, or private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction is other than English shall be denied the right to vote in any election because of his inability to read or write English. The appellees in the *Morgan* case were registered voters in New York City who had filed the suit to challenge the constitutionality of §4(e) of the 1965 Act insofar as it *pro tanto* prohibited the enforcement of the election laws of New York requiring ability to read and write English as a condition for voting.

This Court will note that the foregoing material is paraphrased from the opening portion of the majority opinion of the Court in the *Morgan* case. This Court's opinion in the *Morgan* case states on page 647 as follows:

"Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also

> determine who may vote for United States Representatives and Senators, Art. I, §2; Seventeenth Amendment; Ex parte Yarbrough, 110 U.S. 651, 663, 28 L.Ed. 274, 278, 4 S.Ct. 152."

With total disregard for either the law or logic, the proponents of the 1970 Act are attempting to use the *Morgan* case as authority for holding the 1970 Act to be constitutional. When confined to the facts before the Court at that time, the *Morgan* case held that if a particular state law violated any of the guarantees of the Fourteenth Amendment, the Congress under §5 had the power to legislate as to this particular law. This Court indicated in two different portions of the majority opinion (pgs. 654 and 657) that the congressional act was designed to correct a state law that had brought about invidious discrimination but did not elect to base its decision on this point. The Court did not say that §5 of the Fourteenth Amendment gave Congress the right to legislate *generally* as to voter qualifications. No student of the Constitution should seriously contend that §5 gave the Congress any authority to do anything other than to pass appropriate legislation to enforce the provisions of the Fourteenth Amendment.

In the case of *S. C.* v. *Katzenbach,* supra, 326, this Court held as follows in regard to the power granted Congress by §2 to pass appropriate legislation to enforce §1 of the Fifteenth Amendment:

> "On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment. See United States v. Reese, 92 U.S. 214, 23 L.Ed. 563; James v. Bowman, 190 U.S. 127, 47 L.Ed. 979, 23 S.Ct. 678."

Amicus submits that this is certainly an occasion whereby this Court should exert its power to hold that the

1970 Act preempts the entire field of voting qualifications in a manner not comprehended by §1 of the Fourteenth Amendment.

If a state voter qualification law does not violate the Fourteenth Amendment, §5 gives the Congress no authority whatsoever. If the position urged on this Court by the proponents of the 1970 Act is adopted by the Court, the U.S. Congress would have, by judicial sanction, exclusively preempted the subject matter of voting qualifications in all fifty states. As the Supreme Court in the *Morgan* case said that under the distribution of the powers effected by the Constitution that the States establish qualifications for voting, it is extremely difficult to believe that the Supreme Court is now going to permit the office of the Solicitor General to tell the Court that it said exactly the opposite. *Amicus* contends that the Court must have anticipated that an argument similar to the argument advanced by the proponents of the 1970 Act might be made in the future. In order to discourage any misunderstanding, the Court in footnote 10 to page 651 in the *Morgan* case stated as follows:

> "We emphasize that Congress' power under §5 is limited to adopting measures to enforce the guarantees of the Amendment;" * * *

In the *Morgan* case, the Court referred to Chief Justice Marshall's opinion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, and we quote as follows:

> " 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.' "

The true test, therefore, established by the decision in the *Morgan* case is that Congress *is not authorized to*

pass laws that are not appropriate, that are not legitimate, that are outside the scope of the Constitution, that are, in fact, prohibited by the Constitution and that are totally inconsistent with the spirit and the letter of the Constitution. There is no indication that the decision in the *Morgan* case authorizes the Congress to preempt the entire field covering the matter of voter qualifications and procedures, a subject of admitted vital and paramount interest to the States.

Amicus does not contend that a minimum voting age below twenty-one is irrational but objects to Congress assuming the power to set the minimum age. There is certainly no rationality in the provision completely abolishing durational residential requirements. Any student of politics is aware of the frequent election frauds and abuses that are brought about by voting illiterates and even to a greater extent through the use of absentee ballots. No realistic argument can be made that the incorporation of these procedures into a law passed by a Congress that has no power to supervise elections in the individual states is in any way rational.

There is also the consideration that in Presidential elections, the residential requirement and the absentee voting requirement will be entirely at variance with reasonable and rational state laws on these subjects. When Presidential elections and state elections are held at the same time, some voters will be entitled to a Presidential ballot only, and other voters will be entitled to vote in the entire election. The very least amount of confusion that will result will be the expense and trouble of printing two different ballots.

All of the facts set out hereinabove indicate that the legislation in question is an unwarranted and irrational interference in the affairs of the states as to powers ex-

pressly delegated to the States by the Constitution. *Amicus* calls to the Court's attention the views of Justice Marshall when he was serving as Solicitor-General as set out in his brief in *Katzenbach* v. *Morgan*, supra, and we quote from 16 L.Ed.2d 1318, wherein the annotation of Justice Marshall's brief is set out as follows:

> "Section 4(e) does not unreasonably impinge on the right of the states to fix voting qualifications and procedures. Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775; Louisiana v. United States, 380 U.S. 145, 13 L.Ed.2d 709, 85 S.Ct. 817; United States v. Texas, (D.C. Tex.) 252 F.Supp. 234, affd. 384 U.S. 155, 16 L.Ed.2d 434, 86 S.Ct. 1383; United States v. Alabama, (D.C. Ala.) 252 F.Supp. 95.
>
> • • • "Since the challenged legislation does not unduly trespass on the legitimate prerogatives of any state and imposes no substantial administrative burden, it should be upheld."

Article IV, §4 of the Constitution requires that "The United States shall guarantee to every State in this Union a Republican Form of Government," • • • As the judicial power of the United States is vested in this Court, it has a duty to preserve some semblance of an even balance between the national and state governments and to hold each of these governments in their proper separate sphere. It is the special and preeminent duty of the Supreme Court of the United States to protect the dual system of government in this republic in accordance with the mandate of the Constitution of the United States. *South Carolina* v. *United States*, 199 U.S. 454 (1905).

CONCLUSION

Amicus respectfully submits in conclusion that this Court should declare the provisions of Public Law 91-285, insofar as they (1) suspend the use of literacy tests as prerequisites for voting in states or their political subdivisions not subject to suspension under the Voting Rights Act of 1965, (2) eliminate durational residency requirements in regard to voting for President and Vice President, (3) prescribe uniform nation-wide standards regarding absentee registration and absentee balloting in presidential elections, and (4) reduce to 18 the minimum age for voting in all elections to be unconstitutional.

Respectfully submitted,

A. F. SUMMER
Attorney General of Mississippi
DELOS BURKS
First Assistant Attorney General
WILLIAM A. ALLAIN
Assistant Attorney General
CHARLES B. HENLEY
Post Office Box 326
Jackson, Mississippi
Attorneys for State of Mississippi, Amicus Curiae

Office of the Attorney General
New Capitol Building
Jackson, Mississippi 39205

PROOF OF SERVICE

I, A. F. Summer, Attorney General of Mississippi, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of October, 1970, I served the foregoing Brief on the Merits by the State of Mississippi as Amicus Curiae and Request for Oral Argument upon Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, by depositing a copy thereof in the United States mail, postage prepaid, to his usual mailing address at Tenth and Constitution Avenue, Washington, D.C. 20530.

.....

A. F. SUMMER

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 43, Original

STATE OF OREGON,

Plaintiff,

v.

JOHN N. MITCHELL, Attorney General of the United States,

Defendant.

PLAINTIFF'S REPLY BRIEF

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
THOMAS H. DENNEY
Assistant Attorneys General
Attorneys for Plaintiff
322 State Office Building
Salem, Oregon 97310
(503) 378-4402

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PLAINTIFF'S REPLY BRIEF

Following the lead of Congress, the defendant's brief construes the decision of *Katzenbach v. Morgan*, 384 US 641 (1966) far more broadly than is justified by the Court's careful reasoning of that decision. Such an extended interpretation offends the most basic principles of constitutional law.

UNEQUAL PROTECTION AS THE PREDICATE FOR SECTION 5

Katzenbach v. Morgan recognizes at the outset that the Constitution grants to the States the right to control the franchise to the point of conflict with constitutional guarantees of liberty such as the Fourteenth Amendment. 384 US at 647. The Equal Protection Clause is a restriction upon the States. It is an affirmative grant of power to Congress only as it authorizes that body "to *enforce* the prohibitions by appropriate legislation." 384 US at 648 (original emphasis). Implicit and essential in the reasoning of *Katzenbach v. Morgan* is the proposition that Congress is authorized to act by § 5 of the Fourteenth Amendment only where there is some basis for a congressional determination that there exists an actual or potential condition which is offensive to the Equal Protection Clause.

To sustain the legislation, it is not enough under the rationale of *Katzenbach v. Morgan*, as defendant argues from isolated sentences in that opinion, that the Court perceive a mere basis for the legislation. The Court must perceive a constitutional basis for the congressional de-

termination that invidious discrimination offensive to equal protection exists. Then the Court must inquire whether a basis exists for the congressional determination that the legislative remedy tends to effectuate the ends of the Equal Protection Clause by the eradication of such discrimination.

The doctrine of judicial review remains viable. A congressional determination that a problem of equal protection exists, though entitled to respect, is not binding upon the Court. While Congress may define the conflicts and fashion the remedies, it is for the Court to define the contours of the Equal Protection Clause and set the outer limits within which Congress may act. As stated in the well-reasoned preliminaries of *Christopher v. Mitchell*, Civil No. 1862-70 (DC, Oct. 2, 1970) slip opinion pp. 20-21:

> "* * * As the often repeated quote from Justice Marshall specifies, a court must make the initial—and independent—judgment whether the evil attacked by Congress is one which comes within the scope of the Equal Protection Clause. * * * Only after these preliminary decisions does the loose 'able-to-perceive-a-basis' test enter as the standard for review of the appropriateness of the means Congress has chosen." (footnote omitted)

Or, to use defendant's analogy from *Katzenbach v. McClung*, 379 US 294 (1964) (Def. Br. 13), while Congress may determine what affects interstate commerce and legislate under the Necessary and Proper Clause, it remains always for the Court to define interstate commerce and by doing so describe the constitutional parameters of congressional authority.

Chief Justice Marshall's classic formulation of the extent of congressional powers in *M'Culloch v. Maryland*, 4 Wheat 316, was expressly predicated upon the requirement that the end of the legislation "be within the scope of the Constitution" and that determination does not end at the doors of Congress; it was then and remains subject to judicial review.

This Court in *Katzenbach v. Morgan* did not in any sense yield to the Congress its responsibility to independently determine whether the legislation under examination was related to a condition which could be found to be offensive to the Equal Protection Clause. The Court found that there was a basis for Congress to have determined that extension of the franchise to Puerto Rican-educated citizens might enable them to rectify by political means a condition of invidious discrimination, mainly "the risk or pervasveness of the discrimination in governmental services" 384 US at 653. In its second inquiry, the Court perceived a basis upon which Congress could have determined that the exclusion of non-English educated voters was the direct product of intentional and thus "invidious discrimination in violation of the Equal Protection Clause against citizens of Puerto Rican origin. 384 US 656.

Title III, its history and its effect, cannot be upheld upon the basis of an inquiry parallel to that in *Katzenbach v. Morgan*.

The First Rationale of *Katzenbach v. Morgan*

The first rationale of *Katzenbach v. Morgan* is that

Congress may broaden the franchise as a means to remedy unrelated governmental denials of equal protection. It is from this portion of the opinion that the defendant mistakenly argues (Gov't Ariz Br 26-27; Def Br 12) that this Court held that it need not find a real or potential denial of equal protection in order to sustain the legislation. To the contrary, that sentence of the opinion referred only to the first rationale and the opinion made clear that a discriminatory voting law was not a necessary predicate to federal action where the franchise could be used as a device to remedy other governmental discrimination. In either event, the federal legislation must be predicated upon a perceived violation of equal protection, whether directly or indirectly attacked.

The defendant and the congressional proponents offer a list of legislative reasons to support Title III as conditions to be remedied by franchise extension to 18 year olds, but they offer no description of conditions which are offensive to the Equal Protection Clause:

1. *Liability for Conscription.* There is no claim that liability for conscription is an invidious discrimination offensive to the Equal Protection Clause. Even were it so, it is a discrimination of Congress' making, not that of the States'.

2. *Entry into the workforce.* The entry of 18-year-olds into the workforce and the assumption by them of civic responsibility, is not a condition offensive to the Equal Protection Clause. Further, we suggest that the pursuit of universal education in the last century has

reduced the proportion of 18-year-olds in the workforce to a lesser number than at the time of the adoption of the Fourteenth Amendment, which assumes 21 to be the minimum voting age.

3. *Liability to taxation.* The liability of 18-year-olds to taxation to the same degree as other citizens both younger and older, is not a denial of equal protection.

4. *Entitlement to drink alcoholic beverages.* The fact that some States allow 18-year-olds to drink is not a denial of equal protection.

5. *Competency to marry.* The allowance of 18-year-olds to marry in most States is not a denial of equal protection.

6. *Higher degree of education.* The fact that a greater number of young people are better educated today than ever before is not a denial of equal protection.

7. *Elimination of the "generation gap."* The existence of a so-called "generation gap" may offend sensitivities, but not the Equal Protection Clause.

In sum, the reasons offered for passage of Title III are legislative reasons. They are not descriptions of situations offensive to the Equal Protection Clause to be remedied by extension of the franchise.

The Second Rationale of *Katzenbach v. Morgan*

Neither can Title III be upheld under the second rationale of *Katzenbach v. Morgan*, because there is no basis for a congressional determination that the 21-year minimum age requirement for voting is itself an invidious discrimination against excluded citizens. Whereas

the Court perceived that Congress could have determined that the exclusion of Puerto Ricans was intentional and invidiously discriminatory by judicially determined standards, no such basis exists here and the *ipse dixit* of neither the defendant nor the congressional proponents makes it so.

It cannot be challenged that the States have a legitimate interest in assuring responsibility and maturity in the exercise of the franchise. That legitimate state interest is of a far higher dignity than any interest a state may have in excluding Puerto Rican-educated citizens from the franchise. This Court perceived a finding of the latter condition to be "invidious discrimination in violation of the Equal Protection Clause." 384 US at 656. Reasonable classification by age is neutral in classical Fourteenth Amendment terms of race and national origin.

The defendant virtually acknowledges that protection of state interest by setting of the minimum voting age at 21 is a reasonable classification, but claims that this Court owes great deference to the congressional decision that a different age is more desirable. It cannot be said that the use by a State of the same minimum voting age as that comprehended by the authors of the Fourteenth Amendment itself is unreasonable, arbitrary, invidious, or discriminatory. As Professor Wechsler observed in his letter to The President, "age is obviously not irrelevant to qualifications; and since any age criterion involves the drawing of an arbitrary line fixing the age at twenty-one most certainly is not 'capricious.'"

116 Cong Rec 5649 (daily ed. June 17, 1970). Title III cannot be said to be "consistent with 'the letter and spirit of the Constitution.'" (384 US at 651) because it strikes at state legislation which is consistent with both the letter and spirit of the very amendment which defendant asserts to justify it.

Finally, a distinction based upon a reasonable age classification alone does not trigger the authority of Congress to act under the Equal Protection Clause and Section 5. Otherwise, Congress could usurp State legislatures in any statutory field where reasonable classifications are established by simply disagreeing with the legislative rationale of the state. The Fourteenth Amendment does not authorize congressional entry into areas of state concern (Pl. Br. 20-21) merely because reasonable legislators can differ.

Defendant's Last Argument

Defendant's last argument that the State remains free to extend the franchise to those aged 17, 16 or some lesser age renders hollow the oft repeated disclaimer by this Court that States are free to establish basic qualifications for voters and that age is one of the "obvious examples" of such qualifications within the competence of the States. See, *e.g.*, *Lassister v. Northampton County Bd. of Elections*, 360 US 45 (1959). The defendant's generous conception of the States' prerogative to lower the voting age to 16 leaves the States with little real discretion beyond checking the voters rolls against the coroner's rolls. Title III, as illuminated by the defend-

ant's description of the State's prerogatives (Def. Br. 20-21 and Fn 17) leaves Art. I, § 2, of the Fourteenth Amendment, and the Seventeenth Amendment intact in form but devoid of substance.

CONCLUSION

Title III is not appropriate legislation under § 5 of the Fourteenth Amendment because the ends to be effectuated by lowering the voting age do not relate to conditions prohibited by the Equal Protection Clause of the Fourteenth Amendment. Upon independent judicial review, there is no basis to support a congressional finding that a minimum voting age of 21 is an invidious discrimination or that extending the franchise to the 18 through 20 year old group would effect the remedy of conditions of invidious discrimination. Defendant's brief has not demonstrated to the contrary. Therefore, Title III should be declared unconstitutional and the defendant restrained from enforcing that portion of the Act.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

JACOB B. TANZER
Solicitor General

DIARMUID F. O'SCANNLAIN
Deputy Attorney General

AL J. LAUE
THOMAS H. DENNEY
Assistant Attorneys General
Attorneys for Plaintiff

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 44, Original

STATE OF TEXAS, *Plaintiff*,

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*.

DAWN P. GERMAN, *Applicant for Intervention*

MOTION FOR LEAVE TO INTERVENE

---

1. Dawn P. German, by her attorneys, moves this Court for leave to intervene in this cause as a defendant, pursuant to Rule 9(2) of this Court and Rule 24(a) and (b) of the Federal Rules of Civil Procedure.

2. Said Dawn P. German is a citizen and resident of the State of Texas residing at 1725 Poplar Street, Dallas. She was born on August 16, 1951. Under the Court's decision in this case she will be eligible to vote in federal elections, but not in state and local elections, prior to her 21st birthday.

3. Applicant seeks leave to intervene for the purpose of moving this Court to rehear this case.

4. The basis for her motion for rehearing will be that the Congress has the power to regulate state and local elections under Article I, Section 8, clauses 1, 2, 12, 13 and 14 of the Constitution.

5. Said constitutional defense to the action was not raised by the defendant Attorney General, and the Court has not ruled thereon. To the best of applicant's information, knowledge and belief, defendant Attorney General does not intend to raise this defense by motion for rehearing or otherwise.

6. Applicant claims right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure in that she has an interest in the matter that is the subject of the action, that the disposition of the action may as a practical matter impair her ability to protect that interest, and that the defendant has not adequately represented her interest.

7. In the alternative applicant applies for leave to intervene under Rule 24(b) of the Federal Rules of Civil Procedure in that her defense has common questions of law and fact with the main action.

NATHANIEL R. JONES

CLARENCE MITCHELL

J. FRANCIS POHLHAUS

Attorneys for Applicant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 44, Original

STATE OF TEXAS, *Plaintiff*,

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*.

DAWN P. GERMAN, *Applicant for Intervention*

MOTION FOR REHEARING

Dawn P. German, by her attorneys, moves, pursuant to Rule 58(1) of this Court, subject to the Court's granting her leave to intervene, for rehearing of the case.

The basis for her motion is that the Court, in deciding the case, failed to consider a substantial constitutional defense to the action, namely the power of Con-

gress under Article I, Section 8, Clauses 1, 2, 12, 13 and 14 of the Constitution.

NATHANIEL R. JONES

CLARENCE MITCHELL

J. FRANCIS POHLHAUS

Certificate of Counsel

I hereby certify this motion for rehearing is submitted in good faith and not for delay.

J. FRANCIS POHLHAUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 44, Original

STATE OF TEXAS, *Plaintiff*,

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*.

DAWN P. GERMAN, *Applicant for Intervention*

BRIEF OF THE APPLICANT FOR INTERVENTION IN SUPPORT OF MOTION TO INTERVENE AND MOTION FOR REHEARING

STATEMENT OF THE CASE

On June 22, 1970, President Nixon signed into law Public Law 91-285, the Voting Rights Act Amendments of 1970. Section 302 of said law provided that any citizen of the United States otherwise qualified to vote shall not be denied the right to vote in any federal, state or local election because of age if such citizen is 18 years of age or older.

The State of Texas instituted the present action to enjoin enforcement of Section 302 and other provisions of Title III of the Act. On December 21, 1970, this Court upheld the constitutionality of Section 302 as applied to state and local elections but held it un-

constitutional as applied to state and local elections. 39 *U.S. Law Week* 4027

In the course of the proceedings before this Court, the Department of Military and Veterans Affairs of the National Association for the Advancement of Colored People filed an *amicus curiae* brief in support of the Attorney General in the companion case of *State of Oregon* v. *Mitchell,* argued jointly with this case. In its brief, the NAACP proposed as a defense the authority of Congress under Article 1, Section 8, Clauses 1, 2, 12, 13 and 14, the "war" or "national defense" powers. This defense was not raised by the defendant Attorney General and was not considered by this Court.

The intervenor is a 19 year old citizen and resident of the State of Texas. Under this Court's ruling in the instant case she is eligible to vote in federal elections prior to her 21st birthday, but not in state and local elections. Relying on the constitutional issues raised in the NAACP brief, she believes this Court erred in finding the provisions of Section 302 of the Voting Rights Act Amendments of 1970 unconstitutional as applied to state and local elections. Accordingly she seeks a rehearing of the case before this Court.

ARGUMENT

I. The applicant for intervention has a right to intervene.

Rule 9 (2) of this Court provides that in original actions the Federal Rules of Civil Procedure, where their application is appropriate, may be taken as a guide to procedure.

Rule 24 (a) of the Federal Rules of Civil Procedure provides that:

> Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the

> applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The former rule requiring that the intervenor be bound by the rule of *res adjudicata* was repealed by the 1966 revision of the rule. *Atlantis Development Corporation* v. *U. S.*, 379 F.2d 818, 823-4 (5th Cir., 1967).

The necessary requirements for intervention were set out in *Neusse* v. *Camp*, 285 F.2d 694; 128 U.S. App. D.C. 172, 177 (1967) as follows:

> "(i) an interest in the transaction, (ii) which the applicant may be impeded in protecting because of the action, (iii) that is not adequately represented by others."

It is submitted that these criteria are met: 1.) The applicant has a direct interest in the transaction. It is her right to vote in state and local elections that is being denied by the Court's decision. 2.) She is being impeded in protecting this right. Although the doctrine of *res adjudicata* would not apply in the strict sense to prevent her from pursuing her right, it would apply in a practical way. The doctrine of *stare decisis* and the supremacy of this Court as the interpreter of the Constitution would preclude the applicant from obtaining any redress in any court except this one. 3.) Her interest has not been protected adequately by the defendant Attorney General in that he has not raised the constitutional defenses in the action that she proposes. Nor is there any indication that he will do so in a motion for rehearing, as will be demonstrated

more fully later herein. Accordingly the applicant has a right to intervene under Rule 24.

The "timely" provision of the Rule does not preclude intervention subsequent to judgment or decision. *Hurd* v. *Illinois Bell Telephone Co.*, 234 F.2d 943 (7th Cir., 1956), cert. den. 352 U.S. 918, rehearing den., 352 U.S. 977; *Cuthill* v. *Ortman-Miller Machine Co.*, 216 F.2d 336 (7th Cir., 1954); *Pellegrino* v. *Nesbit*, 203 F.2d 463 (9th Cir., 1953); *Wolpe* v. *Poretsky*, 144 F.2d 505; 79 App. D.C. 141 (1944), cert. den. 323 U.S. 777.

As stated in the *Pellegrino* case:

> "Intervention should be allowed even after a final judgment where it is necessary to preserve some right to which cannot otherwise be protected." p. 464

We believe the applicant has amply demonstrated that her right cannot otherwise be protected. As in *Pellegrino*, she was unable to intervene earlier because the Attorney General was pursuing a defense in the action, albeit on different grounds than those she proposes.

At the present time there is every reason to believe that the Attorney General has abandoned his defense. He has not raised, and it appears that he will not raise, the constitutional issue proposed by the applicant as a defense. Applicant's counsel, in their capacity as representatives of the NAACP, have requested the Attorney General to move for a rehearing based on Congressional national defense powers. This request was denied. A copy of their telegram containing this request is contained in an appendix to this brief.

In both *Pellegrino* and *Wolpe* the intervenors sought intervention for the purpose of appealing adverse decisions, upon showing that the principal parties would

not do so. In both cases their applications were granted. Here the applicant in effect seeks the same result, in that the only appeal from a decision of this Court is by way of a rehearing.

There is, we submit, additional relevance in the *Wolpe* case. There the principal was a municipal zoning board, an agency with the duty of protecting the public interest. The intervenors were property owners whose rights would be adversely affected by the failure to appeal. Here, the Attorney General has the same duty to protect the rights of the public, and specifically, under the statute that is the subject of this litigation, the rights of the applicant and other young people in the 18 to 20 year old age range. As in *Wolpe,* the application to intervene should be granted so public rights may be adequately protected.

Even if the Court should decide against the applicant's claim to a right to intervene, we feel it is an appropriate case for permissive intervention under Rule 24 (b) of the Federal Rules of Civil Procedure.

II. The rehearing should be granted.

Reid v. *Covert,* 354 U.S. 1 (1956) is a precedent upon which a rehearing could (and we respectfully urge should) be granted.

In *Reid* this Court reversed its prior decision upon rehearing. The rehearing had been granted because of the Court's failure in the original hearing to adequately consider a constitutional provision, namely, Article I, Section 8, Clause 14.

We submit that in this case the Court has given not inadequate, but no, consideration to Article I, Section 8, Clauses 1, 2, 12, 13 and 14 of the Constitu-

tion. As it did in *Reid,* the Court should grant a rehearing for the purpose of fully considering the constitutional issue raised by the applicant for intervention.

We do not intend here to fully argue the merits of the applicant's position. That has been done in the NAACP brief already on file in the case and will be done more fully if the applicant's motions are granted. But in the interest of demonstrating that the claim is not unsubstantial or frivolous, we wish to briefly summarize the argument:

1. The Court must give every presumption of constitutionality to legislative enactment. *Nebbia* v. *New York,* 291 U.S. 502, 538 (1934).

2. This Court and lower federal courts have sanctioned federal invasion of states rights in various ways under the national defense power: taxation, *Dameron* v. *Brodhead,* 345 U.S. 322 (1953); property law, *Wissner* v. *Wissner,* 338 U.S. 655 (1950); state constitutional provision on disposition of state land, *Case* v. *Bowles,* 327 U.S. 92 (1946); court procedures, *Wenatchee Produce Co.* v. *Great Northern Railway Co.,* 271 F. 784 (E.D., Wash., 1921).

3. Congress intended to invoke the national defense powers. With respect to those granted the franchise under Section 302, Senator Mansfield, sponsor of the 18 year old voting amendment stated:

> "They fight our wars. You can brush aside that argument all you want, but it is a most important argument, and I think these youngsters who are called because of our responsibility, because we have laid down the policy, should have

a right at least in some part, to influence the setting of that policy." 116 *Congressional Record,* S-3502, daily edition.

Many other Senators and Congressmen spoke in a similar vein, evidencing a connection between the law and national defense.

4. Even if Congress did not specifically invoke the national defense powers, if they provide a constitutional basis for the law, the Court must uphold it. This Court has said "it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." *Fleming* v. *Nester,* 363 U.S. 603, 612 (1960), rehearing den. 364 U.S. 854 (1960).

5. Congress most likely concluded, as we and apparently eight members of this Court, that the qualification for voters in federal and state elecitons are firmly bound together by the provisions of Article I, Section 2 of the Constitution and the 17th Amendment, and that to alter the qualifications for voting in federal elections would require alteration of those for voting in state elections.

* * * * * *

Failure to resolve the constitutional issue posed here could lead to considerable confusion in the area of constitutional interpretation. One need only cite the precedent of the failure of this Court to rule on the authority of Congress to regulate commerce in the *Civil Rights Cases,* 109 U.S. 3 (1883) to demonstrate the inadvisability of the Court's failure to act on a constitutional issue properly before it.

Moreover, failure to rule here and now on the power of Congress to regulate elections under its national de-

fense powers would most likely only postpone a resolution of the problem. Further Congressional action could be expected. Already commentators are suggesting the exercise of these powers by Congress. See White, "The Court's 'Theological Liberalism' ", New York *Times,* 1/6/71, p. 35.

Proceeding without the guidance the Court could give in this case, Congress could very well again pass legislation the constitutionality of which would be in doubt pending final appeal to this Court. Such legislation could cause untold confusion in state and local elections, confusion the Court could avert by a rehearing in this case.

CONCLUSION

The applicant for intervention is entitled to intervene under Rule 24(a) of the Federal Rule of Civil Procedure. Her motion for a rehearing should be granted in order that the Court resolve a substantial constitutional issue present in this case, on which it has not ruled.

NATHANIEL R. JONES
1790 Broadway
New York, New York 10019

CLARENCE MITCHELL
1239 Druid Hill Avenue
Baltimore, Maryland

J. FRANCIS POHLHAUS
422 First Street, S. E.
Washington, D. C. 20003

Attorneys for Applicant for Intervention

APPENDIX

COPY

Honorable John N. Mitchell
Department of Justice
Washington, D. C.

The National Association for the Advancement of Colored People urges you to move in the Supreme Court for rehearing in *Oregon* v. *Mitchell* on the 18 year voting provisions of the Voting Rights Act Amendments of 1970 as they relate to state and local elections. The basis for such a motion would be the national defense powers of Congress embodied in Article 1, Section 8 of the Constitution. The statements of Senator Mansfield, the chief sponsor of the 18 year old voting amendment, and other Members of the Senate and House indicate to us that Congress intended to invoke these powers in passing the legislation. The Supreme Court has not ruled on this important constitutional issue. Contrary to the statement in Justice Harlan's opinion that no other constitutional basis than Section 5 of the 14th Amendment was advanced for the 18 year old voting law, reliance on the defense powers was advocated in the amicus curiae brief of the Department of Military and Veterans Affairs of the NAACP. Recent revelations in the press in connection with the Congressional investigation of Justice Douglas indicate that issues are screened before being presented to the full Court. The failure of the Court to consider this constitutional issue leads us to believe that this may have occurred in this case. Only by a full hearing on the issue can the Court determine the extent of Congressional power in this area. Failure to act will leave a serious gap in the Court's interpretation of the Constitution that could readily be settled in this case. Again we urge your action to assure that the Court will have the opportunity by means of a rehearing to

explore all possible aspects of Congressional power as it relates to the 18 year old vote.

NATHANIEL R. JONES
General Counsel, NAACP

J. FRANCIS POHLHAUS
Counsel, Washington Bureau, NAACP

CLARENCE MITCHELL
Director, Washington Bureau, NAACP

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

MOTION FOR LEAVE TO FILE COMPLAINT

The United States of America respectfully asks leave of the Court to file its complaint against the State of Arizona submitted herewith.

JOHN N. MITCHELL,
Attorney General.
ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

401-417—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

COMPLAINT

The United States of America, plaintiff, alleges as follows:

For a First Cause of Action:

I

This action states a controversy between the United States and the State of Arizona; this Court accordingly has original jurisdiction under Article III, Section 2 of the Constitution of the United States; see, also, 28 U.S.C. 1251(b)(2).

II

The United States brings this action to vindicate the supremacy of federal law. It seeks to enjoin the State of Arizona from enforcing provisions of its constitution and statutes which are contrary to and incon-

sistent with the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. (Supp. V) 1973–1973p, as amended by the Voting Rights Act Amendment of 1970, 84 Stat. 314.

III

Under Arizona law, registration is a prerequisite for voting in all elections. Section 16–102, Arizona Revised Statutes. The registration of voters is carried out by agents of the state.

IV

Under Section 16–101(A)(4) of the Arizona Revised Statutes, an applicant may not register to vote unless he is able to read the Constitution of the United States in the English language. Section 16–101 (A)(5) of the Arizona Revised Statutes provides that an applicant must be able to write his name as a prerequisite to registration.

V

Section 201 of Title II of the Voting Rights Act of 1965, as amended, took effect upon enactment on June 22, 1970, and provides for the suspension of literacy tests until August 6, 1975, in all states and counties not subject to the provisions of Section 4(a) of the Voting Rights Act of 1965. Yuma County is the only county of Arizona subject to Section 4(a) of such Act.

VI

The continued enforcement, prior to August 6, 1975, of Sections 16-101(A)(4) and (5) of the Revised Statutes of Arizona directly conflicts with Section 201 of the Voting Rights Act of 1965, as amended, and is thus unlawful under Article VI of the Constitution of the United States.

VII

On July 16, 1970, the Attorney General wrote (Exhibit A, *infra,* pp. 9–12) to the Governor of the State of Arizona explaining the provisions of the Voting Rights Act Amendments of 1970 and seeking an assurance that the state would comply with them. By return letter, dated July 24, 1970 (Exhibit B, *infra,* pp. 12–14), the Attorney General of the State of Arizona indicated that the state would not comply with the provisions of Sections 201 and 302 of the Amended Act.

VIII

Unless restrained by this Court, the State of Arizona, through its agents, will continue to enforce and implement the Arizona constitutional and statutory provisions relating to registration and voting which conflict with the Voting Rights Act of 1965, as amended, and will thereby prevent and interfere with implementation of such Act.

For a Second Cause of Action:

IX

Repeats and realleges paragraphs I–III.

X

Article 7, Section 2 of the Constitution of Arizona and Section 16–101(A)(2) of the Arizona Revised Statutes, provide that as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of twenty-one years prior to the date of the ensuing general election.

XI

Section 302 of Title III of the Voting Rights Act of 1965, as amended, provides that no citizen of the United States who is otherwise qualified to vote in any state or political subdivision in any primary or election shall be denied the right to vote with respect to any primary or election held on or after January 1, 1971, on account of age if such citizen is eighteen years of age or older.

XII

The continued enforcement of the age requirements for registration and voting contained in the constitution and statute of the State of Arizona directly conflicts with Section 302 of the Voting Rights Act of 1965, as amended, and is thus unlawful under Article VI of the Constitution of the United States.

XIII

Repeats and realleges paragraphs VII and VIII.

Plaintiff, the United States, requests that this Court issue a declaratory judgment that:

(a) Sections 16–101(A) (4) and (5) of the Arizona

Revised Statutes are unenforceable until August 6, 1975, because they are suspended by Section 201 of the Voting Rights Act of 1965, as amended; and that

(b) Article 7, Section 2 of the Constitution of Arizona and Section 16–101(a)(2) of the Arizona Revised Statutes are unforceable to the extent they conflict with Section 302 of the Voting Rights Act of 1965, as amended.

Plaintiff further requests that this Court

(1) Enjoin the State of Arizona and its agents from:

(a) Enforcing Sections 16–101(A) (4) and (5) of the Arizona Revised Statutes until August 6, 1975;

(b) Enforcing the voting age provisions in the constitution and statute of the State of Arizona to the extent that such provisions are inconsistent with Section 302 of the Voting Rights Act of 1965, as amended; and

(2) Direct the State of Arizona and its agents to adopt whatever procedures may be necessary to bring the State of Arizona into full and prompt compliance with Sections 201 and 302 of the Voting Rights Act of 1965, as amended; and

(3) Grant such other relief as the interest of justice may require.

JOHN N. MITCHELL,
Attorney General.
ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

APPENDIXES

EXHIBIT A

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 16, 1970.

Hon. JOHN R. WILLIAMS,
Governor of Arizona,
Phoenix, Ariz.

DEAR GOVERNOR WILLIAMS: On June 22, 1970, the Voting Rights Act Amendments of 1970, Public Law 91-285, were signed by the President. I am writing in order to bring to your attention the major provisions of the new law and to request your cooperation in implementing it.

The 1970 Amendments extend for five years the period of coverage of basic provisions of the Voting Rights Act of 1965 and broaden somewhat the coverage formula of the Act; suspend until August 6, 1975, the use of literacy and similar tests in any state or county not subject to suspension under section 4(a) of the 1965 Act; eliminate durational residency requirements as a precondition for voting for President and Vice President and prescribe uniform standards regarding absentee registration and absentee voting in presidential elections; and lower to 18 the minimum age for voting in all elections. A copy of the Voting Rights Act Amendments and a section-by-section analysis of the statute are enclosed.

As you know, Yuma County is presently subject, on the basis of section 4(a) of the Voting Rights Act, to suspension of literacy and similar tests. Please note that among the provisions continued by the 1970 law

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is section 5 which requires covered counties to submit changes in voting qualifications or procedures to the Attorney General or seek a declaratory judgment in the District Court for the District of Columbia before the new standards or procedures may be implemented. In order to insure that any voting changes adopted by the state or the covered county is given full attention by the Attorney General, we suggest that (1) the new enactments be submitted promptly after their adoption, (2) only those changes dealing with voting procedures and qualifications be submitted, (3) the changes be submitted only after they are fully enacted and (4) any available supporting data be submitted with the change.

The other counties of your state are not now subject to suspension of tests pursuant to section 4(a). However, by virtue of another provision, section 201 of the Voting Rights Act as amended, the literacy requirement imposed by state law (Ariz. Rev. Stat., § 16–1101.) is suspended until August 6, 1975, with respect to the other counties. (It should be noted that section 201 does not make applicable to the latter counties the pre-clearance provisions of section 5.) The prohibition set forth in section 201 took effect upon enactment, i.e., on June 22, 1970. Under section 203, it is my responsibility to take all steps necessary to secure compliance with the prohibition against the use of literacy tests.

Title III, which reduces voting age to 18, is to take effect with respect to any election or primary held on or after January 1, 1971. The statute does not specify when persons 18 and over who are not presently eligible should be allowed to register. However, based upon normal rules of construction, it is my view that each state must afford such individuals a reason-

able opportunity to register so as to be eligible to vote in any primary or election held during 1971.

According to my information, existing law in your state does not permit persons to vote until they are 21 years of age. Under the supremacy clause of the United States Constitution, the present inconsistent provision of state law is superseded.

A prompt determination by each state of the registration and election procedures it will follow for all elections after January 1, 1971, seems essential so that appropriate arrangements can be made. Moreover, you will note that by section 303 of the new statute I am "authorized" and "directed" by Congress to institute legal proceedings necessary to implement Title III.

Accordingly, I request that you review this matter with other state officials and advise me of the instructions regarding implementation of Title III which your state will distribute to registrars and election officials. In my view, such instructions should include a clear statement that persons who will be 18 years of age or over at the time of any primary or election held on or after January 1, 1971, shall be eligible to register for and vote at such election, notwithstanding any contrary provision of state law.

The provision regarding residency requirements, section 202, relates only to voting for President and Vice President and does not affect requirements in regard to congressional or state and local elections. The section concerning residency and absentee registration and balloting contemplates express changes in state law, unless present state laws are no more restrictive than the standards prescribed by the new statute. I suggest that the requirements of section 202, particularly those as to absentee voting and absentee registration, be carefully reviewed.

In conclusion, let me request your cooperation in regard to prompt and effective implementation of the reforms prescribed by Congress. So that this Department may meet its enforcement responsibilities, I ask that you advise me at your earliest convenience of the steps to be taken by your state to carry out the above-described provisions of the Voting Rights Act as amended. Because of the urgency involved it will be necessary for us to assume that, unless we receive a positive response by August 3, 1970, your state does not intend to comply fully with the new statute. In any such case, we will take appropriate action to effectuate the congressional mandate.

If you have any inquiries regarding the Voting Rights Act as amended or if there is any other way that we can be of assistance, please communicate directly with Jerris Leonard, Assistant Attorney General, Civil Rights Division.

Thank you for your cooperation.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

EXHIBIT B

DEPARTMENT OF LAW,
OFFICE OF THE ATTORNEY GENERAL,
Phoenix, Ariz., July 24, 1970.

Re: Interpretation of Voting Rights Act Amendments of 1970 (Public Law 91-285).

Hon. JOHN N. MITCHELL,
Attorney General of the United States,
Department of Justice,
Washington, D.C.

Dear General Mitchell: Since the President signed the Voting Rights Act Amendments of 1970 (Public

Law 91-285), this office has been reviewing this new law as it relates to the Arizona Constitution and statutes. We have had meetings with the County Attorneys, and have discussed the matter with the legislative leadership of Arizona, as well as the Governor's office. Your letter to the Governor of July 16, 1970, brought matters to a head, and this letter reflects the consensus conclusions of the appropriate officials of the State of Arizona.

First, the easy part. The State of Arizona will conform its laws and practices as soon as possible, and, in any event, before the advent of the next presidential election, to the federal standards set out in the above referenced Act with regard to voting for President and Vice President. We now provide for most of the procedures, but some changes in state law will be necessitated as regards the time factors. We will prepare the necessary amendments for the next session of our Legislature, commencing in January, 1971, and contemplate no problem in conforming Arizona's law to the federal standards.

Now, the more difficult decision. After considerable deliberation, it is the consensus of the state officials of Arizona that we must resist the efforts of the Congress, by legislative fiat, to abrogate our long standing requirements of literacy in the English language and of the attainment of 21 years of age as prerequisites for voting in Arizona. There is general agreement that a serious question of the constitutionality of the action of Congress in these two instances exists, and must be tested in the federal courts.

I would therefore request, on behalf of the State of Arizona, that you institute, pursuant to both Section 203 and Section 303 of the Act, appropriate proceedings in the United States District Court for the District of Arizona to enforce compliance. We will, of

course, immediately respond to any Order of said Court in the premises.

One final item should be mentioned. The lawyers of our office, bolstered by at least some hearsay information from Department of Justice sources, have assumed that, until the questioned sections of the Act have been tested in some appropriate federal forum, there was no exposure to the criminal sanctions imposed by Sections 204 and 303(b) of the Act. If this information is not correct, please advise immediately, so we can take appropriate action to protect our public officials and volunteer registration people from this risk.

Our office will cooperate in any way possible to expeditiously determine this serious question of federal-state responsibility and jurisdiction. If you have any questions concerning our position, or if we can furnish you any additional information, please contact me at your earliest convenience.

Thanking you in advance for your courtesies in this matter, I remain,

Sincerely yours,

GARY K. NELSON,
The Attorney General.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

MOTION FOR INTERIM RELIEF

The United States respectfully moves the Court, for the reasons stated in the accompanying brief, to enter an interim order temporarily enjoining the defendant and its agents from enforcing the literacy test provided for in Sections 16–101(A)(4) and (5) of the Arizona Revised Statutes and directing the defendant and its agents to permit illiterate, but otherwise qualified persons to register provisionally during a period of at least three weeks, so that such persons may vote in the November 3, 1970 general election if the Court decides this case in favor of the United States prior to such date.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES OF AMERICA, PLAINTIFF
v.
STATE OF ARIZONA, DEFENDANT

MOTION FOR EXPEDITED CONSIDERATION

The United States respectfully moves the Court to expedite consideration of the case as follows:

(a) By requiring any response to the attached motion for leave to file and motion for interim relief to be submitted by August 31, 1970; and

(b) By establishing a briefing schedule that will permit the case to be heard at the October argument session, if the Court grants leave to file when it reconvenes in October. The United States will file its brief on the merits by September 10, and suggests that the defendant's brief on the merits should be filed by October 5.

JOHN N. MITCHELL,
Attorney General.
IRWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

MOTION FOR LEAVE TO FILE COMPLAINT

The United States of America respectfully asks leave of the Court to file its complaint against the State of Idaho submitted herewith.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

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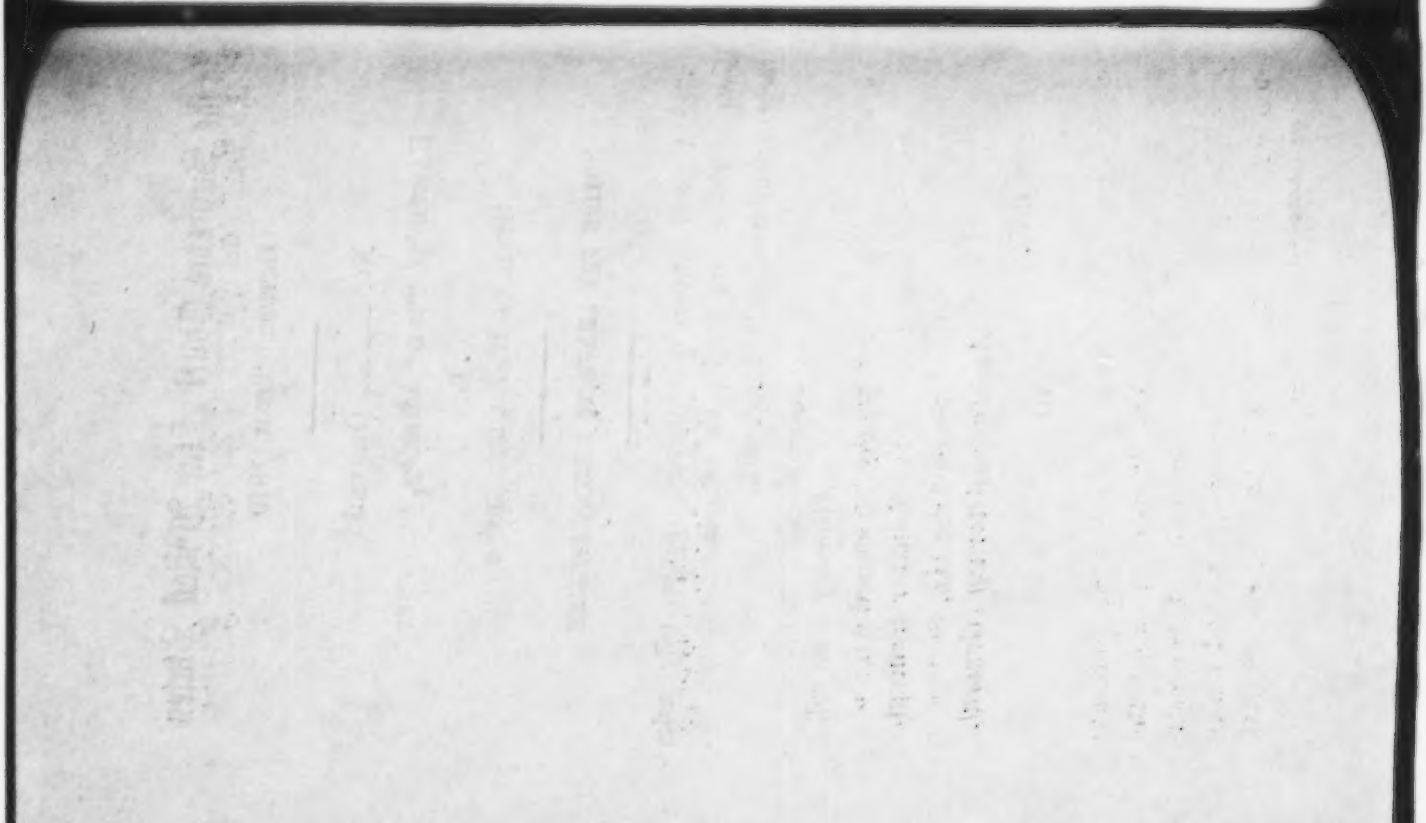

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

COMPLAINT

The United States of America, plaintiff, alleges as follows:

For a First Cause of Action:

I

This action states a controversy between the United States and the State of Idaho; this Court accordingly has original jurisdiction under Article III, Section 2 of the Constitution of the United States; see also 28 U.S.C. 1251(b)(2).

II

The United States brings this action to vindicate the supremacy of federal law. It seeks to enjoin the State of Idaho from enforcing provisions of its constitution and statutes which are contrary to and inconsistent with the Voting Rights Act of 1965, 79 Stat.

437, 42 U.S.C. (Supp. V) 1973–1973p, as amended by the Voting Rights Act Amendments of 1970, 84 Stat. 314.

III

Under Idaho law, registration is a prerequisite for voting in all elections. Idaho Constitution, Article 6, Section 2. The registration of voters is carried out by agents of the state.

IV

Under Article 6, Section 2 of the Idaho Constitution and Sections 34–408 and 34–409 of the Idaho Code, an otherwise qualified citizen who has been a resident of the state for less than six months may vote for presidential or vice presidential electors, only if he has been a resident of the state for 60 days next preceding the day of election and has fulfilled the state registration requirement by applying for a presidential ballot, in person, at least ten days prior to the day of the election.

V

Absentee voting in Idaho for a presidential election is apparently authorized only for persons who at the time of such election continue to meet that state's durational residency requirements. Idaho Code, Section 34–1101. Absentee ballots must be received by the issuing officer by noon on the day of an election. Idaho Code, Section 34–1105.

VI

Section 202 of Title II of the Voting Rights Act

of 1965, as amended, provides that no citizen of the United States who is otherwise qualified to vote in any election for president or vice president shall be denied the right to vote for electors in such elections because of the failure to comply with any durational residency requirement. Each state is required to provide means for registration and voting by all duly qualified residents of such state who apply not later than 30 days prior to any presidential election. In addition, persons who departed from a state after the thirtieth day next preceding such election are required to be allowed to vote by that state in person or by absentee ballot.

Finally, Section 202 provides that absentee ballots in presidential elections must be issued to all qualified voters who make application seven or more days prior to such elections and such ballots must be counted if returned to the appropriate election official prior to the closing of the polls. No citizen who is otherwise qualified to vote by absentee ballot may be denied that right because of any requirement of registration that does not include a provision for absentee registration.

VII

The continued enforcement of the durational residency reqirements and absentee voting provisions (to the extent inconsistent with Section 202 of the Voting Rights Act of 1965, as amended) for voting for presidential and vice presidential electors in the constitution and statutes of the State of Idaho directly conflicts with Section 202 of the Voting Rights Act of 1965, as amended, and is thus unlawful under Article VI of the Constitution of the United States.

VIII

On July 16, 1970, the Attorney General wrote (Exhibit A, *infra*, pp. 9–12) to the Governor of the State of Idaho explaining the Voting Rights Act Amendments of 1970 and seeking an assurance that the state would comply with them. By return letter, dated August 3, 1970 (Exhibit B, *infra*, pp. 12–14), the Attorney General of the State of Idaho indicated that the state would not comply with the Amended Act, unless forced to do so by court order.

IX

Unless restrained by this Court, the State of Idaho, through its agents, will continue to enforce and implement the Idaho constitutional and statutory provisions relating to registration and voting which conflict with the Voting Rights Act of 1965, as amended, and will thereby prevent and interfere with implementation of such Act.

For a Second Cause of Action:

X

Repeats and realleges paragraphs I–III.

XI

Article 6, Section 2 of the Idaho Constitution and Sections 34–401 and 34–807 of the Idaho Code provide that as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of twenty-one years prior to the date of the ensuing general election.

XII

Section 302 of Title III of the Voting Rights Act of 1965, as amended, provides that no citizen of the United States who is otherwise qualified to vote in any state or political subdivision in any primary or election shall be denied the right to vote with respect to any primary or election held on or after January 1, 1971, on account of age if such citizen is eighteen years of age or older.

XIII

The continued enforcement of the age requirements for registration and voting contained in the constitution and statutes of the State of Idaho directly conflicts with Section 302 of the Voting Rights Act of 1965, as amended, and is thus unlawful under Article VI of the Constitution of the United States.

XIV

Repeats and realleges paragraphs VIII and IX.

Plaintiff, the United States, requests that this Court issue a declaratory judgment that:

(*a*) The durational residency requirements and absentee voting provisions contained in the Constitution and statutes of the State of Idaho are unenforceable with respect to presidential elections to the extent their provisions conflict with Section 202 of the Voting Rights Act of 1965, as amended; and

(*b*) The age requirement established by the constitution and statutes of the State of Idaho is unenforceable as to any primary or election held on or after January 1, 1971, to the extent it conflicts with Section 302 of the Voting Rights Act of 1965, as amended.

Plaintiff further requests that this Court

(1) Enjoin the State of Idaho and its agents from:

(a) Enforcing the durational residency requirements and absentee voting provisions in the constitution and statutes of the State of Idaho to the extent that such requirements and such provisions are inconsistent with Section 202 of the Voting Rights Act of 1965, as amended;

(b) Enforcing the voting age provisions in the constitution and statutes of the State of Idaho to the extent that such provisions are inconsistent with Section 302 of the Voting Rights Act of 1965, as amended; and

(2) Direct the State of Idaho and its agents to adopt whatever procedures may be necessary to bring the State of Idaho into full and prompt compliance with Sections 202 and 302 of the Voting Rights Act of 1965 as amended; and

(3) Grant such other relief as the interest of justice may require.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

APPENDIX

EXHIBIT A

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., July 16, 1970.

Hon. DON SAMUELSON,
Governor of Idaho,
Boise, Idaho.

DEAR GOVERNOR SAMUELSON: On June 22, 1970, the Voting Rights Act Amendments of 1970, Public Law 91-285, were signed by the President. I am writing in order to bring to your attention the major provisions of the new law and to request your cooperation in implementing it.

The 1970 Amendments extend for five years the period of coverage of basic provisions of the Voting Rights Act of 1965 and broaden somewhat the coverage formula of the Act; suspend until August 6, 1975, the use of literacy and similar tests in any state or county not subject to suspension under section 4(a) of the 1965 Act; eliminate durational residency requirements as a precondition for voting for President and Vice President and prescribe uniform standards regarding absentee registration and absentee voting in presidential elections; and lower to 18 the minimum age for voting in all elections. A copy of the Voting Rights Act Amendments and a section-by-section analysis of the statute are enclosed.

Our analysis of the constitutions and statutes of the various states indicates that your state has a re-

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quirement which is a "test or device" within the meaning of the Voting Rights Act. (See Ida. Code, § 34-404.) Accordingly, that requirement is now subject to suspension, until August 6, 1975, by virtue of section 201 of the Voting Rights Act as amended. Please note that the prohibition of section 201 took effect upon enactment, i.e. on June 22, 1970.

Under section 203, it is my responsibility to take all steps necessary to secure compliance with the prohibition against the use of literacy and other tests. I suggest that registration and election officials in your state be informed as soon as possible that they must cease applying any literacy (or similar) requirement.

It is possible that, in the future, your state or certain of its counties will be determined to be covered by the provisions of section 4 of the Voting Rights Act as amended. However, no such determination has yet been made. Should such determination be made in the future, we will provide explanatory material.

Title III, which reduces voting age to 18, is to take effect with respect to any election or primary held on or after January 1, 1971. The statute does not specify when persons 18 and over who are not presently eligible should be allowed to register. However, based upon normal rules of construction, it is my view that each state must afford such individuals a reasonable opportunity to register so as to be eligible to vote in any primary or election held during 1971.

According to my information, existing law in your state does not permit persons to vote until they are 21 years of age. Under the supremacy clause of the United States Constitution, the present inconsistent provision of state law is superseded.

A prompt determination by each state of the registration and election procedures it will follow for all

elections after January 1, 1971, seems essential so that appropriate arrangements can be made. Moreover, you will note that by section 303 of the new statute I am "authorized" and "directed" by Congress to institute legal proceedings necessary to implement Title III.

Accordingly, I request that you review this matter with other state officials and advise me of the instructions regarding implementation of Title III which your state will distribute to registrars and election officials. In my view, such instructions should include a clear statement that persons who will be 18 years of age or over at the time of any primary or election held on or after January 1, 1971, shall be eligible to register for and vote at such election, notwithstanding any contrary provision of state law.

The provision regarding residency requirements, section 202, relates only to voting for President and Vice President and does not affect requirements in regard to congressional or state and local elections. The section concerning residency and absentee registration and balloting contemplates express changes in state law, unless present state laws are no more restrictive than the standards prescribed by the new statute. I suggest that the requirements of section 202, particularly those as to absentee voting and absentee registration, be carefully reviewed.

In conclusion, let me request your cooperation in regard to prompt and effective implementation of the reforms prescribed by Congress. So that this Department may meet its enforcement responsibilities, I ask that you advise me at your earliest convenience of the steps to be taken by your state to carry out the above-described provisions of the Voting Rights Act as amended. Because of the urgency involved, it will be necessary for us to assume that, unless we receive a positive response by August 3, 1970, your state does

not intend to comply fully with the new statute. In any such case, we will take appropriate action to effectuate the congressional mandate.

If you have any inquiries regarding the Voting Rights Act as amended or if there is any other way that we can be of assistance, please communicate directly with Jerris Leonard, Assistant Attorney General, Civil Rights Division.

Thank you for your cooperation.

Sincerely,

JOHN N. MITCHELL,
Attorney General.

cc: Hon. Robert M. Robson,
Attorney General of the State of Idaho.

EXHIBIT B

STATE OF IDAHO,
OFFICE OF THE ATTORNEY GENERAL,
Boise, Idaho, August 3, 1970.

Re: Public Law 91–285, Voting Rights Act Amendments of 1970.

Hon. JOHN A. MITCHELL,
United States Attorney General,
U.S. Department of Justice,
Washington, D.C.

DEAR MR. MITCHELL: Governor Samuelson has transferred to this office your letter of July 16, 1970 requesting that I prepare an answer on behalf of the State of Idaho.

At this point in time it would be impossible for Idaho to meet the requirements of the subject Amendment. Our legislature is not in session and will not be until January 1971. Compliance with the amended Act would require amendment of the Idaho Consti-

tution and a number of Idaho statutes. In view of what I consider to be the precariousness of the legal hypothesis presented in support of P.L. 91-285 I would hesitate to request the Governor to call a Special Session of the Legislature, unless the Supreme Court of the United States or the Supreme Court of Idaho enters a proper decree.

Research by this office, while not exhaustive, reveals that it is reasonably clear that the Constitution of the United States provides for the election method of Federal elective officers. Article I, Section 2, United States Constitution sets forth the procedure for election of Congressmen, and the Seventeenth Amendment to the United States Constitution provides for the election of senators. It is clear that these provisions leave it to the several states to provide the qualifications of electors of the most numerous branch of the state legislature, subject only to the provisions of the United States Constitution. *Ex Parte Yarbrough,* 110 U.S. 651, 28 L. ed. 274, 4 S. Ct. 152; *Pope* v. *Williams,* 193 U.S. 621, 633, 28 L. ed. 817, 882, 24 S. Ct. 573; *Lassider* v. *North Hampton County Board of Elections,* 360 U.S. 45, 79 S. Ct. 985. It has been held that the states have broad powers to determine the conditions under which the right of suffrage may be exercised in the states; *Carrington* v. *Rash,* 380 U.S. 89, 13 L. ed. (2), 675, 85 S. Ct. 775; *Kramer* v. *Union Free School District,* 395 U.S. 621, 23 L. ed. 2d. 583, 89 S. Ct. 1886.

While some argument favorable to the subject Amended Act may be made by interpretation of the Fourteenth Amendment, Section 5, U.S. Constitution, and Article VI of the United States Constitution, as interpreted by *Katzenbach* v. *Morgan,* 834 U.S. 641, 16 L. ed. 828, 86 S. Ct. 1717; we believe that it is clear historically that such an approach cannot be used to

revise the language and intent of the United States Constitution, and those of the several states without destroying completely the foundation of the Federal system.

On behalf of the State of Idaho I must respectfully reject the enforcement of the provisions of the Amended Act without specific Court order. We will stand available to assist in the preparation of a proper foundation for a court test of P.L. 91.285.

Very truly yours,

ROBERT M. ROBSON.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

MOTION FOR EXPEDITED CONSIDERATION

The United States respectfully moves the Court to expedite consideration of the case as follows:

(*a*) By requiring any response to the attached motion for leave to file to be submitted by August 31, 1970; and

(*b*) By establishing a briefing schedule that will permit the case to be heard at the October argument session, if the Court grants leave to file when it reconvenes in October. The United States will file its brief on the merits by September 10, and suggests that the defendant's brief on the merits should be filed by October 5.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———, Original

UNITED STATES, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

No. ———, Original

UNITED STATES, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

BRIEF IN SUPPORT OF MOTIONS FOR LEAVE TO FILE ORIGINAL COMPLAINTS, MOTIONS FOR EXPEDITED CONSIDERATION AND MOTION FOR INTERIM RELIEF

JURISDICTION

The jurisdiction of this Court to entertain the original complaints of the United States against the States of Arizona and Idaho rests on Article III, Section 2 of the United States Constitution; see also 28 U.S.C. 1251(b)(2).

QUESTION PRESENTED

Whether the Voting Rights Act Amendments of 1970 are constitutional insofar as they (1) suspend

the use of literacy tests as prerequisites for voting in states or their political subdivisions not subject to suspension under the Voting Rights Act of 1965, (2) eliminate durational residency requirements in regard to voting for President and Vice President and prescribe uniform standards regarding absentee registration and absentee balloting in presidential elections and (3) reduce to 18 the minimum age for voting in all elections.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment provides as follows:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314, are set forth in Appendix A, *infra*, pp. 35–43.

The pertinent provisions of Article 7, Section 2 of the Arizona Constitution and Sections 16–101 and 16–107 of the Arizona Revised Statutes are set forth in Appendix B, *infra*, pp. 44–45.

The pertinent provisions of Article 6, Section 2 of the Idaho Constitution and Sections 34–401, 34–408, 34–409, 34–1101, and 34–1105 of the Idaho Code are set forth in Appendix C, *infra*, pp. 46–48.

STATEMENT

The Voting Rights Act Amendments of 1970 were signed by the President on June 22, 1970. The new law extends for five years operation of section 4(a) of the Voting Rights Act of 1965, the provision whose primary effect was to suspend the use of literacy tests in six Southern states and part of a seventh state, and adds two new titles to the 1965 Act. Title II contains provisions which suspend the use of literacy tests in all states and counties not already subject to suspension by virtue of the 1965 Act, abolish durational residency requirements with respect to voting for President and Vice President and establish uniform standards regarding absentee registration and absentee balloting in presidential elections. Title III reduces to 18 the minimum age for voting in all elections.

The Voting Rights Act Amendments specifically authorize and direct the Attorney General to enforce their provisions. See Sections 203 and 303(a)(1). In order to meet this responsibility, the Attorney

General wrote to the Governor of each state explaining the new law and seeking an affirmative assurance that the state would comply with it (See, *e.g.*, Exhibit A to each complaint). The Attorneys General of Arizona and Idaho stated that their states would not comply with the statute (Exhibit B to each complaint). Accordingly, the United States is seeking to institute these actions against the states of Arizona and Idaho to enjoin operation of the provisions of their constitutions and statutes that are inconsistent with the Voting Rights Act Amendments.

The suit against Arizona seeks to enforce compliance with sections 201 and 302 of the Act. Section 201, which took effect upon enactment, suspends until August 6, 1975, the use of literacy and other voting tests;[1] Section 302, applicable to any primary or election held on or after January 1, 1971, lowers the voting age to 18.[2]

The action against Idaho seeks to compel that state to comply with Section 202 of the Act, which abolishes durational residency requirements for voting in presidential elections and establishes uniform standards

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[1] Under Section 16-101(A)(4) of the Arizona Revised Statutes, an applicant may not register to vote unless he is able to read the Constitution of the United States in the English language. Section 16-101(A)(5) of the Arizona Revised Statutes provides that an applicant must be able to write his name as a prerequisite to registration.

[2] Article 7, Section 2 of the Constitution of Arizona and Section 16-101(A)(2) of the Arizona Revised Statutes, provide that as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of twenty-one prior to the date of the ensuing general election.

relative to absentee registration and balloting in presidentical elections,[3] and with Section 302.[4]

The complaints seek declaratory and injunctive relief. In addition, because Section 201 took effect upon enactment and thus is applicable to elections to be held this fall, we are seeking interim relief to require Arizona to permit illiterate, but otherwise qualified persons to register on a provisional basis so that such persons may vote in the November 3, 1970, general election if the Court decides this case in favor of the United States prior to such date.

ARGUMENT

The burden of our present argument is that the complaints present controversies within the original jurisdiction of this Court and that, in light of the nature of the cases the Court should exercise that jurisdiction by granting the motions for leave to file the complaints and setting the cases down for consideration on an expedited basis, together with the com-

[3] Under Article 6, Section 2 of the Idaho Constitution and Sections 34-408 and 34-409 of the Idaho Code, an otherwise qualified citizen who has been a resident of the state for less than six months may vote for presidential and vice presidential electors, only if he has been a resident of the state for 60 days next preceding the election and has fulfilled the state registration requirement by making application for a presidential ballot, in person, at least ten days prior to the election.

[4] Article 6, Section 2 of the Idaho Constitution and Section 34-401 of the Idaho Code provide that as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of twenty-one years prior to the date of the ensuing general election.

plaints filed by Oregon and Texas in *Oregon* v. *Mitchell*, No. 43, Original, and *Texas* v. *Mitchell*, No. 44, Original.

I. THIS COURT HAS ORIGINAL JURISDICTION TO ENTERTAIN THE COMPLAINTS

This Court has original jurisdiction to entertain the complaints if they state justiciable controversies between the United States and the States of Arizona and Idaho. U.S. Constitution, Art. III, Sec. 2; 28 U.S.C. 1251(b)(2); *South Carolina* v. *Katzenbach*, 383 U.S. 301; see *United States* v. *West Virginia*, 295 U.S. 463, 470, and cases therein cited. Although the jurisdiction of this Court is not exclusive, since Congress has vested concurrent jurisdiction in the district courts, see Sections 203 and 303 of the Act (Appendix A, *infra*, pp. 40, 42), the statutes empowering district courts to entertain such proceedings do not deprive this Court of the original jurisdiction conferred on it by the Constitution.[5] *South Carolina* v. *Katzenbach*, *supra*. The only open questions, therefore, are (1) whether the United States is the proper party plaintiff, (2)

[5] Article III provides that "In all Cases * * * in which a State shall be Party, the supreme Court shall have original Jurisdiction." No provision is made for congressional regulation of such jurisdiction—in sharp contrast to cases in which "the supreme Court shall have appellate Jurisdiction * * * with such Exceptions, and under such Regulations as the Congress shall make." Congress thus may not limit the Court's original jurisdiction. See *Marbury* v. *Madison*, 1 Cranch 137, 174; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 332. In light of this constitutional principle, the fact that Congress provided only for suit in a three-judge district court to enforce the Voting Rights Act Amendments cannot be interpreted as intended to preclude this Court's original jurisdiction.

whether Arizona and Idaho are the proper defendants, and (3) whether an actual controversy exists between the parties in each instance.

A. The United States has inherent power to vindicate its rights in its own courts without special legislative authorization. See *United States* v. *California*, 332 U.S. 19, 27; *Sanitary District of Chicago* v. *United States*, 266 U.S. 405, 425–426; *Kern River Co.* v. *United States*, 257 U.S. 147, 154–155; *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 278–280, 284–285. Whatever its non-statutory standing to enforce the federal rights of citizens, the United States has the inherent authority and responsibility to vindicate the supremacy of federal law and the integrity of a national program against state resistance—an interest quite distinct from that of the individual beneficiaries of the Voting Rights Act. See *In re Debs*, 158 U.S. 564; *Faubus* v. *United States*, 254 F. 2d 797 (C.A. 8), certiorari denied, 358 U.S. 829; *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861, 866 n. 9 (E.D. La.), affirmed *sub nom. New Orleans* v. *Bush*, 366 U.S. 212; *Bush* v. *Orleans Parish School Board*, 191 F. Supp. 871, 875–879 (E.D. La.), affirmed *sub nom. Denny* v. *Bush*, 367 U.S. 908; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.), affirmed, 368 U.S. 515; *United States v. Mississippi*, No. 19,475, decided September 9, 1962 (C.A. 5), leave granted to United States to be joined as respondent, certiorari denied *sub nom. Mississippi* v. *Meredith*, 372 U.S. 916. That is the essence of these cases. The complaints do not assert the personal rights of individuals, but the broader right of the United States

to secure obedience to its law as required by the Supremacy Clause.

There is also a statutory basis for standing in these cases. Sections 203 and 303 of the Voting Rights Act Amendments (Appendix A, *infra*, pp. 40, 42) explicitly provide for proceedings by the United States to enforce the Act.[6] The validity of such provisions conferring standing is settled by *United States* v. *Raines*, 362 U.S. 17, and *United States* v. *Mississippi*, 380 U.S. 128. See, also, *Alabama* v. *United States*, 371 U.S. 37; *Louisiana* v. *United States*, 380 U.S. 145.

Thus, it is plain that the United States is authorized to institute these actions in its own name.

B. Arizona and Idaho are proper defendants in these cases. At least since *United States* v. *Texas*, 143 U.S. 621, it has been settled that the states, by joining the Union and submitting to the Constitution, surrendered any claim of "sovereign immunity" as against the national government. And all other constitutional objections were rejected in *United States* v. *Mississippi*, 380 U.S. 128, 138–141. See, also, *Alabama* v. *United States*, 371 U.S. 37; *Louisiana* v. *United States*, 380 U.S. 145. Sections 203 and 303 both provide that a state may be made the defendant in an enforcement action.

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[6] The letter of Arizona's Attorney General (Exhibit B to Complaint against Arizona) gives ample "reason to believe that [Arizona] * * * is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in Section 201" (Section 203) as well as ample basis for determining that this suit is required to enforce against Arizona the provisions of Title III (Section 303). In like manner, the letter of Idaho's Attorney General (Exhibit B to Complaint against Idaho) justifies proceedings under such sections to enforce the provisions of Section 202 and Title III.

Moreover, Arizona and Idaho are the *appropriate* defendants in these cases. Acting through their chief legal officers, both states have announced policies of disobedience of the statute. These statements unquestionably will have an immediate impact upon officials in both states. Election officials, aware of the respective statements, will necessarily be reluctant to register persons younger than twenty-one, permit registration (in Arizona) without first administering the literacy test,[7] or permit registration (in Idaho) in violation of the durational residency requirements and thus ~~that a state may be made the defendant in an enforce~~ to act inconsistently with the official state view. The true controversies are thus with the States of Arizona and Idaho themselves. Underlying these controversies are state decisions, reached at the highest level, to resist the Voting Rights Act Amendments and continue to apply state voting qualifications invalidated by the federal law.

The enforceability of the affected provisions of each state's constitution and statutes—for each state as a whole—is at issue in both cases. The burden of the defense appropriately falls on the states themselves. No fully effective remedy can be given until each state, in all its governmental operations, is enjoined from ignoring the supremacy of the Voting Rights Act Amendments. In short, the named states are the

[7] One county in Arizona, however, has indicated that it will comply, at least in part, with the new federal law. The government received a telegram from an official of Pima County stating that illiterates would be registered in that county.

real parties in interest and it is appropriate that they be held to answer; to hold the contrary "would without justification in reason diminish the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights." *United States* v. *Mississippi,* 380 U.S. 128, 141.

C. Each of the causes of action stated in the complaints presents a case or controversy appropriate for resolution by the judicial process.

Section 201, suspending literacy tests until August 6, 1975, is immediately effective. Yet, Arizona insists upon its right to administer, and is continuing to administer, its literacy test in contravention of the federal law. Thus, there is an immediate controversy. Whether or not it will prove too late to grant effective relief for this fall's elections (see pp. 20–22, *infra*), the controversy remains alive for each succeeding election. *Moore* v. *Ogilvie,* 394 U.S. 814.

Section 202, the residency provision, will first be relevant in the 1972 presidential elections. Again, however, immediate action on the part of the state is called for. The subject of the section is relatively complex, and the section envisions that the states will enforce it by legislative means, conforming their own statutes where necessary to the federal standards.

Most states responding to the Attorney General's request have indicated their intention to submit appropriate legislation amending conflicting state laws during the forthcoming legislative sessions, and we assume that Idaho, if compelled to obey the federal

statute, would take a similar course. The conflict between state and federal laws is thus real and immediate, in view of the state's formal refusal to comply with the Voting Rights Act Amendments; the fact that it will first be significant in an election to occur in 1972 does not deprive the controversy of justiciability. *Moore* v. *Oglivie, supra.*

In the case of Title III, the obligations of Arizona and Idaho to register persons between the ages of eighteen and twenty-one to vote matures immediately following the general election to be held on November 3, 1970, when the registration books in the two states will be open for registration for subsequent elections.[8] Arizona Revised Statutes, Section 16-101, Idaho Code, Section 34-807. The present age requirements in effect in the two states together with the present refusal of state officials to prepare for post-election registration, are sufficient to create controversies suitable for judicial resolution. *Pierce* v. *Society*

[8] Title III is effective "with respect to any primary or election held on or after January 1, 1971." Section 305. The date of its effectiveness for purposes of registration and other preparatory acts is unstated. The most reasonable inference is that the Act requires the registration of eighteen year olds as soon as that becomes possible without risk of interference with elections held prior to January 1, 1971. For, aside from delays warranted to give effect to Congress' intent not to apply the provision to this fall's general elections, the statute requires that eighteen year olds be treated like other voters in every way. Moreover, the numerous special elections—for example, for the approval of bond issues—which may be held at any time of year and which are within the purview of Title III require that registration be possible for a reasonable time before the year begins.

of Sisters, 268 U.S. 510, 536. Indeed, this Court found a *1972* election issue, no less abstract, litigable *last* year. *Moore* v. *Ogilvie,* 394 U.S. 814;[9] cf. *South Carolina* v. *Katzenbach, supra.*

This litigation neither presents the risks of a collusive suit, nor seeks an advisory opinion. It arose out of the United States Attorney General's demand on the states for assurance that they would comply with the new federal law. That demand was appropriate, in view of the widespread expressions of constitutional doubt which had been broadcast regarding the statute, and the need to protect national election processes from uncertainty. To wait until the eve of a particular election to seek enforcement of the statute against recalcitrant states would be to forfeit its enforcement for that election. Cf. *South Carolina* v. *Katzenbach, supra.*

Arizona and Idaho, in turn, were free in their choice of response. Like most states, they might have acquiesced in the supremacy of federal law. They could have obeyed the statute provisionally, bringing suit here or in the District Court for the District of Columbia to enjoin enforcement of the provisions they believe unconstitutional. They chose to resist. The United

[9] *Brockington* v. *Rhodes,* 396 U.S. 41, and *Hall* v. *Beals,* 396 U.S. 45, presented more tenuous issues. In *Brockington,* the appellant had limited his request for relief to the 1968 election; in view of this limitation, the action became moot once the election was held. In *Hall,* Colorado's subsequent enactment of an amendatory statute made the appellants unrepresentative of the class they purported to represent since, under the new provision, they could have registered for Colorado elections had it been in effect.

States did not procure that resistance, and is entitled to the aid of its courts in bringing it, if unwarranted as we believe, to a speedy end.

II. THESE ARE APPROPRIATE CASES FOR THE EXERCISE OF THE ORIGINAL JURISDICTION OF THIS COURT

A. Normally, in cases of concurrent jurisdiction, the plaintiff—here the United States—chooses the forum and, in the absence of some special statutory provision (*e.g.*, permitting removal), his choice is binding, unless the court, applying the principle of *forum non conveniens,* finds that the balance of conveniences as between the parties makes the forum of the plaintiff's choice clearly inappropriate. See 28 U.S.C. 1404(a). No such ground appears here.

To be sure, the rule is not fully applicable to cases within the non-exclusive original jurisdiction of this Court, with respect to which a more expansive principle of inconvenient forum has been expressed. Thus, it has been said that leave to file an original action may be denied "where there is no want of" a "suitable" alternative forum; where assumption of original jurisdiction "might seriously interfere with the discharge by this Court" of its other responsibilities; where "'considerations of convenience, efficiency and justice'" counsel abstention—where, in short, there is "need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction." *Massachusetts* v. *Missouri,* 308 U.S. 1, 19. See, also, *Louisiana* v. *Cummins,* 314 U.S. 580; *Georgia* v. *Pennsylvania R.*

Co., 324 U.S. 439, 464–465; *id.*, 469–470 (dissenting opinion). Yet, here, too, the plaintiff's decision to invoke the original jurisdiction of this Court is entitled to respect and will not be overridden in the absence of important countervailing considerations.[10]

B. Reasons for declining jurisdiction include the presence of factual issues that could more practicably be determined in a state or lower federal court. Cf. *United States* v. *Texas*, 339 U.S. 707, 715. In the October 1965 Term, this Court denied the government's motion for leave to file a complaint in *United States* v. *Alabama*, *United States* v. *Mississippi*, and *United States* v. *Louisiana*, 382 U.S 897. There, an important and perhaps controlling factor in the Court's exercise of its discretion was the presence of factual issues whose resolution might have proven burdensome. Those actions involved provisions of the Voting Rights Act of 1965 which called for administrative implementation by federal examiners.

But, there is no such obstacle to the exercise of this Court's jurisdiction in the present cases, for the provisions of the Voting Rights Act Amendments of 1970 which are sought to be enforced do not require such administrative implementation. The complaints which we ask the Court's leave to file present only questions of law. Furthermore, the non-compliance of the defendant

[10] We suggest no disinclination on the part of the defendants to acquiesce in the resolution of the controversy in this Court. On the contrary, Texas and Oregon have invoked this forum (*Oregon* v. *Mitchell*, No. 43, Original, *Texas* v. *Mitchell*, No. 44, Original) and Arizona and Idaho may well agree that a direct adjudication here is desirable.

states is based solely on the constitutional issues so that it is unlikely that the Court would be required continually and closely to supervise implementation of the decrees we request.

The present actions, in which the United States seeks to secure compliance with recently enacted federal legislation protecting fundamental political rights, are also clearly distinguishable from the litigation involved in *Massachusetts* v. *Missouri*, 308 U.S. 1. In refusing its discretionary original jurisdiction in that case involving the effort of one state to collect a tax claim against a citizen of another state, the Court appears to have been specifically concerned about establishing a precedent requiring the Court to entertain frequent original actions in matters of relatively little moment. In contrast, the present suits involve rare, direct confrontations between states and the federal government. It is, we submit, precisely for the resolution of such serious disputes that this Court's original jurisdiction over controversies between the United States and a state is most appropriately invoked.

The issues presented by the complaints will not require a trial, and the states themselves are the only parties called upon to respond. As we view the cases, neither extensive pleadings nor elaborate factual presentations will be necessary. The issue which controls this litigation—and fully disposes of it—is the constitutionality of three provisions of the Voting Rights Act Amendments of 1970, a question which must reach this Court in due course and may appropriately be resolved here in the first instance.

That determination does not require an evidentiary trial. To be sure, Arizona and Idaho may wish to challenge the appropriateness of the legislation to implement the Fourteenth Amendment and "legislative facts" may be relevant to that question. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–154. "But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." *Id.* at 154. So long as there is a "rational basis" for the congressional action, the Court's function is at an end. *Katzenbach* v. *Morgan*, 384 U.S., 641; *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304.

C. We believe it is important that this Court hear this suit in conjunction with the actions recently filed against Attorney General Mitchell by Texas and Oregon. Those actions challenge only one part of the Voting Rights Act Amendments—Title III, which creates a nationwide voting age of 18. It is about this provision that the bulk of constitutional controversy has arisen. But the eighteen-year-old vote is only one part of the statute, and Congress' adoption of Title III must be seen against the backdrop of the statute as a whole. The constitutional justification for Title III is very similar to that for Sections 201 and 202, all relying heavily on congressional findings of discrimination and this Court's opinion in *Katzenbach* v.

Morgan, supra. While the congressional findings differ as between the voting age, residency and literacy test issues, the underlying problems are closely similar.

Thus, although the government's causes of action against Arizona and Idaho relating to Title III raise no issue not already before this Court in the Oregon and Texas suits, the other causes of action of those complaints present questions which supplement those suits in an important way, by placing before this Court, in proper perspective, the full panoply of voting reforms sought to be implemented by Congress through the passage of the Voting Rights Act Amendments.

III. THE CASES ARE SUSCEPTIBLE OF EXPEDITED CONSIDERATION IN THIS COURT

We agree with the suggestion of Texas and Oregon, in their suits against Attorney General Mitchell, that it is important to secure a prompt resolution of the constitutional issues regarding the eighteen-year-old vote and accordingly have suggested an accelerated schedule of briefing and argument if the Court grants the requested leave to file the compliants. For the reasons already stated, we believe these cases should be heard together with those two.

In addition, the imminence of this fall's elections makes it apparent that there must be an early hearing of the complaint against Arizona insofar as it concerns that state's non-compliance with Section 201. It has been estimated that approximately 73,200 persons otherwise eligible to vote in Arizona are unable to qualify under present state laws because of their

illiteracy.[11] If there is to be any hope of securing the vote for such persons in the upcoming general elections, relief must be forthcoming promptly.

Expedited consideration would be foreclosed, however, if the usual procedure in original actions were to be followed. Under that procedure, the defendant has 60 days to respond to a motion for leave to file. Accordingly, we have moved for expedited consideration of the cases, including prompt responses to our motions for leave to file. We submit that an accelerated schedule is wholly appropriate in the circumstances.

Although the confrontation between the United States and the several States involved is acute and the issue that divides the parties is of great moment, the legal question is not complex. The dispute requires no clarification: it appears on the surface and need not be defined by a long series of pleadings or sifted out of a mass of evidence or exhibits. The parties have taken their stand and already know the basis for their respective positions. As we have noted, facts are not at issue and no trial is involved. All that remains is the articulation of supporting arguments on each side. Against that background it seems not unreasonable to suggest that the parties may properly be required to present their case within such time limits as will permit the Court to decide the controversy before January 1, 1971, when elections will begin to

[11] See Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess., p. 216 (hereinafter "Sen. Hearings").

be affected by Title III, and if possible, before this fall's general elections. Compare *Williams* v. *Rhodes*, 393 U.S. 23.

To this end, we have moved that the defendants be required to file any response to the accompanying motions by August 31, we shall file our brief on the merits by September 10 and we suggest that the defendants file their briefs on the merits by October 5. it reconvenes in October, the cases could be heard at the October argument session.

While the requested acceleration would involve a relatively short time for briefing these important cases, the parties will have substantial notice and opportunity for preparation from the filing of this motion. The Court has granted acceleration of its proceedings in other cases of great urgency and importance. See, *e.g.*, *Hannah* v. *Larche*, 361 U.S. 910; *United States* v. *Thomas*, 361 U.S. 950; *Cooper* v. *Aaron*, 358 U.S. 1; *Wilson* v. *Girard*, 354 U.S. 524; *Youngstown Co.* v. *Sawyer*, 343 U.S. 579; *Ex parte Quirin*, 317 U.S. 1. The very generous time allotments for pleadings and briefs made by the Court's present Rules appear designed for the more usual original actions involving exceedingly complex and factually intricate property disputes. Considering the very different character of the present cases, the policy of the Rules is not opposed to our request for expedited treatment. The course we suggest affords

the best means of assuring an orderly presentation of the important issues involved in sufficient time to permit effective implementation of the federal act.

V. THIS COURT SHOULD GRANT INTERIM RELIEF DIRECTING ARIZONA TO REGISTER FOR THIS FALL'S GENERAL ELECTIONS OTHERWISE QUALIFIED PERSONS WHO ARE ILLITERATE

Arizona is presently refusing to register illiterates, in flat disobedience to Section 201. Registration books close, by statute, at the close of business on the seventh Monday preceding the election—in this case, September 21, 1970. Arizona Revised Statute, Section 16–107 (1969 Supp.). In order to preserve the possibility that illiterates will be allowed the vote in this fall's elections if Section 201 is upheld, it is necessary to require the state to register such persons provisionally—either in advance of the closing of the state's registration books or, if that cannot be done, on a special basis—to enforce the federal statute.

The United States has therefore moved for an interim order, directing Arizona to register illiterate persons otherwise eligible to vote in this fall's elections on a provisional basis so that, if the statute is upheld, they can be permitted to vote. If it proves impossible for the Court to act on this aspect of our pleadings before September 1, or its reconvening on October 5, we suggest that the Court provide for a meaningful period—three weeks in our view would be sufficient—in which to effect this registration irrespective of the state's ordinary closing law. Other-

wise, the federal act can not possibly be given effect for this fall's elections.

Similar relief was given by Mr. Justice Stewart in an appellate docket case which arose during summer recess, *Williams* v. *Rhodes*, 393 U.S. 23, 27, 28. And the Court has entertained and acted upon a request for interim relief in an original action, after a motion for leave to file a complaint had been granted. *United States* v. *Arizona*, 294 U.S. 692, 693, 695. We have found no situation in which such relief was sought in an original case in advance of the granting of leave to file, but we believe this Court clearly possesses the power to so act. It has the authority to issue all writs necessary or appropriate in aid of its jurisdiction, 28 U.S.C. 1651, and Fed. R. Civ. P. 65, authorizing such relief through temporary or permanent injunction, applies in original actions by virtue of Rule 9(2) of the Rules of this Court. Furthermore, Rule 51(1) provides that "writs of injunction may be granted by any justice in cases where they might be granted by the court." We believe that consultation among the justices on the government's motion for interim relief would be highly desirable; we suggest only that there is no need to wait until the Court reconvenes in October to grant the requested interim relief.

The relief we seek would not prejudice Arizona's interest in keeping its rolls free from persons not entitled to be registered should Section 201 be found unconstitutional. It would be entirely proper to keep

a separate registry of, or otherwise identify, those persons registered under the Court's order, so that they could be excluded from the polls in the event the statute was not upheld. The possible expense or inconvenience of registering such persons would not appear to be great, particularly if it can be done at the same time as the state's registration books are ordinarily open for registration. On the other hand, if registration is not ordered, the individuals denied it will have lost irretrievably their right to vote this fall.

Finally, the government's chances of success on the merits of its complaint are substantial. In support of our motion for interim relief against Arizona, we turn now to a discussion of the validity of Section 201.

A. It is well settled that, just as the Fifteenth Amendment prohibits racially discriminatory abridgement of the franchise, the Fourteenth Amendment prohibits restrictions on the right to vote which violate the Equal Protection Clause.[12] Furthermore, Congress is empowered to enforce the provisions of each amendment by "appropriate legislation." Fifteenth Amendment, Section 2; Fourteenth Amendment, Section 5. The nature of this congressional authority was considered at length in *South Carolina* v. *Katzenbach*,

[12] The Court has struck down, on the ground of inconsistency within the Equal Protection Clause, a variety of limits on the right to vote. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186; *Reynolds* v *Sims*, 377 U.S. 533; *Carrington* v. *Rash*, 380 U.S. 89; *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663; *Kramer* v. *Union Free School District*, 395 U.S. 621; *Cipriano* v. *City of Houma*, 395 U.S. 701; *City of Phoenix* v. *Kolodziejski*, No. 1066, O.T. 1969, decided June 23, 1970; *Moore* v. *Ogilvie*, *supra*; *Williams* v. *Rhodes*, 393 U.S. 23; *Evans* v. *Cornman*, No. 236, O.T. 1969, decided June 15, 1970.

383 U.S. 301, and *Katzenbach* v. *Morgan*, 384 U.S. 641.

In *South Carolina* v. *Katzenbach*, this Court upheld the constitutionality of major provisions of the Voting Rights Act of 1965, including Section 4(a), which suspended the use of tests in states and counties which came within a specified coverage formula.[13] Regarding the authority of Congress, the Court stated (383 U.S. at 326–327):

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
>
> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

Under similar reasoning the Court in *Katzenbach* v. *Morgan* held Section 4(e) of the Act[14] to be a proper exercise of the power granted Congress by Section 5 of the Fourteenth Amendment. Expressly rejecting the view that the authority of Congress to prohibit enforcement of a state law, under that Section, was restricted to situations where a court had

[13] Section 4(a), 42 U.S.C. (Supp. V) 1973b(a). The coverage formula is set forth in section 4(b), 42 U.S.C. (Supp. V) 1973b(b).

[14] Section 4(e), 42 U.S.C. (Supp. V) 1973b(e), is the provision which in effect prohibited the application of English language literacy tests to persons educated in Puerto Rico.

found or would find the state law to be unconstitutional, the majority stated (384 U.S. at 648–649):

> Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex parte Virginia*, 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment. See *Fay* v. *New York*, 332 U.S. 261, 282–284. [Footnotes omitted.]
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> * * * * *
>
> [O]ur task in this case is not to determine whether the New York English literacy requirement as applied * * * [to persons educated in Puerto Rico] violates the Equal Protection Clause. * * * [The question is:] Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment? * * *

The Court held (384 U.S. at 650–651) that, in determining whether federal legislation based upon the Fourteenth Amendment is "appropriate," the applicable standard is that set forth in *McCulloch* v. *Maryland*, 4 Wheat. 316—the same test relied upon, in regard to the Fifteenth Amendment, in *South Carolina* v. *Katzenbach*, *supra*. Section 5 was described as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

In finding the enactment of Section 4(e) to be a valid exercise of this legislative power, the Court perceived two permissible bases for the legislation. The first was to enable Puerto Ricans in New York and the other states to obtain, through increased voting strength, nondiscriminatory treatment in public services (*e.g.*, schools). The Court stated that it was for Congress to weigh the various conflicting considerations, including alternative means of remedying discrimination in governmental services, and to determine whether section 4(e) was needed to further the aim of the Equal Protection Clause. As to judicial review, "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did" (384 U.S. at 653).

The second basis was a congressional desire to eliminate what Congress found to be invidious discrimination in establishing voter qualifications. After referring to the fundamental importance of the right to vote, on the one hand, and the possible interests of

the state in requiring English literacy on the other, the Court said (384 U.S. at 655–656):

> * * * Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting * * * to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that * * * [the New York requirement] constituted an invidious discrimination in violation of the Equal Protection Clause. [Footnote omitted.]

While two members of the Court dissented, they recognized that (384 U.S. at 668):

> * * * Decisions on questions of equal protection and due process are based not on abstract logic, but on empirical foundations. To the extent "legislative facts" are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to due respect. [Footnote omitted.]

In effect, therefore, all members of the Court agreed that congressional findings in the area of equal protection, including in particular "matters of popular political participation" (384 U.S. at 670), are to be given substantial weight by the judiciary.

Section 201 of the Voting Rights Act as amended was based upon determinations by Congress that literacy tests and other "tests and devices"[15] (1)

[15] The term "test or device" is defined in Section 201(b), 84 Stat. 315.

have discriminatory effect upon Negroes and other minorities and (2) in any event, are not justified by any substantial interest of the states.[16] As will be shown, these and the other congressional findings underlying Section 201 were fully supported by the legislative record.

B. Section 201 suspends, until August 6, 1975, the use of literacy tests and any similar "test or device" in any state or political subdivision not subject to suspension by reason of Section 4(a) of the 1965 Act.[17] The literacy-test areas which are covered by Section 201 are the States of Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington, Wyoming, and 61 counties in North Carolina.

1. In *South Carolina* v. *Katzenbach, supra,* 383 U.S. 301, 329, the Court noted that, in most of the states covered by the Voting Rights Act of 1965, literacy tests had been purposely administered so as to disfranchise Negroes. With respect to the states subject to

[16] In enacting the Voting Rights Act Amendments, Congress also expressly relied upon the rule, enunciated in *Kramer* v. *Union Free School District*, 395 U.S. 621, *Cipriano* v. *City of Houma*, 395 U.S. 701, and other cases, that state laws limiting the right to vote are subject to a stricter test of constitutionality than are laws affecting other, less vital areas. See, *e.g.*, 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (joint statement of ten members of Senate Judiciary Committee).

[17] The jurisdictions presently subject to suspension under Section 4(a) of the Voting Rights Act are the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia; 39 counties in North Carolina; one county in Arizona; and one county in Hawaii.

suspension under Section 201 of the Act as amended, Congress did not have similar evidence of *intentional* abuse in the administration of tests, but there was evidence before Congress that the practical effect of tests wherever imposed was to discriminate against Negroes,[18] other minorities[19] and the poor.[20] As decisions of this Court following *South Carolina* v. *Katzenbach* have made clear, however, Congress' power to suspend literacy tests is not confined to the suspension of tests administered to effect *intentional* discrimination. *Katzenbach* v. *Morgan,* 384 U.S. 641; *Gaston County* v. *United States,* 395 U.S. 285.

In *Gaston County,* a suit under Section 4(a) of the Voting Rights Act of 1965, this Court refused to per-

[18] A study conducted by the United States Commission on Civil Rights regarding northern and western states, based upon Bureau of the Census tabulations, indicated that "literacy tests do have a negative effect on voter registration and that this impact of literacy tests falls most heavily on blacks and persons of Spanish surname." See Sen. Hearings, *supra*, pp. 399–407.

[19] A statement of Raymond Nakai, the Chairman of the Navajo Tribal Council, said that Navajos in New Mexico (which has no literacy test) are much more likely to be registered voters than are members of the tribe residing in Arizona. According to Mr. Nakai, a major cause of the difference is the Arizona literacy requirement which prevents Navajos who cannot read English or are unsure of their command of English, from attempting to register. Sen. Hearings, p. 678. The Attorney General of Arizona pointed out that: "Many of the older Indians were never privileged to attend a formal school * * *." Sen. Hearings, p. 675. Cf. *Katzenbach* v. *Morgan*, *supra*.

[20] See, *e.g.*, Bureau of the Census, *1960 Census of Population*, vol. 1, pts. 4, 6, and 34, table 138, which shows a definite direct correlation between income and number of years of formal education completed.

mit reinstitution of a literacy test. Accepting as true the county's claim that prior to suspension the test had been administered in a fair and impartial manner and that the county had made significant strides toward equalizing and integrating its school system, the Court noted the "sad truth" that the county had in the past systematically deprived Negroes of the same educational opportunities as had been afforded to whites and that the administration of the literacy test would "serve only to perpetuate those inequities in a different form." 395 U.S. at 296–297.

Congress found, in light of such facts as (1) the failure of Negroes and other minorities, in various parts of the country, to receive equal educational opportunity and (2) the migration of Negroes from the South to literacy-test states, that the *Gaston County* rationale as to the discriminatory effects of literacy requirements applies throughout the United States, even though a particular literacy test is imposed by a government which has not failed to provide equal educational opportunity. The Court assumed in *Gaston County* that most of the adult residents of the county had been educated there (395 U.S. at 293, n. 9). The Court added, however, that: "It would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems." [21] *Ibid.*

[21] In a prior footnote, the Court stated: "We have no occasion to decide whether the Act would permit reinstatement of a

As Attorney General Mitchell suggested in urging support of a nationwide ban on literacy tests, Congress could properly rely upon the fact that large numbers of Negroes have migrated from the South to other parts of the United States.[22] According to the Bureau of the Census, net migration of Negroes from the South between 1940 and 1969 totaled some 3.8 million persons.[23] That such persons received inferior education in segregated systems, both before and after 1954, is indicated by numerous court decisions.[24] And Congress had a valid basis for believing that part of the movement by southern Negroes was to the northern and western states which employ literacy tests.[25]

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literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility" (395 U.S. at 293, n. 8).

[22] Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., p. 223 (hereinafter "House Hearings"); Sen. Hearings, p. 186.

[23] Bureau of the Census, *The Social and Economic Status of Negroes in the United States, 1969*, Current Population Reports, Series P–23, No. 29, p. 5.

[24] See, *e.g.*, *Lee* v. *Macon County Bd. of Ed.*, 267 F. Supp. 458, 471–472 (M.D. Ala.), affirmed, 389 U.S. 215; *United States* v. *Jefferson County Bd. of Ed.*, 372 F. 2d 836, 891–892 (C.A. 5), affirmed on rehearing *en banc*, 380 F. 2d 385, certiorari denied, 389 U.S. 840; *United States* v. *Mississippi*, 229 F. Supp. 925, 990 (S.D. Miss.) (dissenting opinion), reversed, 380 U.S. 128.

[25] For example, the 1960 Census indicates that even during the limited period, 1955–1960, there was substantial migration of Negroes from the South to such states as Arizona (4,388 persons, both adults and children), California (74,804), Massachusetts (7,418) and New York (74,821). See Bureau of the Census, *1960 Census of Population*, vol. I, pts. 4, 6, 23 and 34, table 100.

Finally, the Attorney General and other witnesses pointed out[26] that denial of equal educational opportunity occurs not only in school systems which had *de jure* segregation, but also in systems characterized by *de facto* segregation or racial isolation. The latter conditions exist throughout the United States,[27] including those states whose tests are suspended by Section 201.[28]

In short, the *Gaston County* rationale constitutes strong support for the suspension of literacy tests in the states and counties subject to Section 201.[29]

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[26] See House Hearings, p. 224; Sen. Hearings, p. 186.

[27] See, *e.g.*, House Hearings, p. 56 (statement of Howard A. Glickstein, then Acting Director of the United States Commission on Civil Rights).

[28] Apart from *de facto* segregation, official discrimination against Negroes or Mexican-Americans has been found in a number of public school systems in literacy-test states other than southern or border states. See *Gonzales* v. *Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz.) (inferior schools afforded Mexican-Americans); *Spangler* v. *Pasadena Bd. of Ed.*, 311 F. Supp. 501 (C.D. Cal.) (discrimination against Negroes); *Crawford* v. *Bd. of Ed. of the City of Los Angeles*, No. 822, 854, Super. Ct. for L.A. County (May 12, 1970) (discrimination against Negroes); *Taylor* v. *Bd. of Ed. of City Sch. Dist. of New Rochelle*, 294 F.2d 36 (C.A. 2), certiorari denied, 368 U.S. 940 (racial segregation); and *Blocker* v. *Bd. of Ed. of Manhasset, New York*, 226 F. Supp 208 (E.D. N.Y.) (racial segregation).

[29] In light of the fact that Congress found the problem to be a substantial one in all states, its determination that the application of a uniform remedy to all of the states not covered by Section 4(a) would be "appropriate" surely was a permissible one—regardless of whether the dimensions of the problem are precisely the same in those states newly subject to the suspension as in those that were previously subject to it. Cf. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489–490.

2. In addition to the purpose of Congress to eliminate, through the enactment of Section 201, the effects of unequal educational opportunity upon voter registration, Congress independently determined, as an alternate basis for enacting Section 201, that the possible interests of a state in maintaining a literacy requirement are not sufficient to justify the resulting disfranchisement. See 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (joint statement of ten Senate Judiciary Committee members).

At the hearings on the legislation, many witnesses stated that, in view of the widespread availability of radio and television and the coverage given to local and national issues, a person need not be able to read to be informed.[30] The Report of the President's Commission on Registration and Voting Participation (November 1963) had reached the same conclusion and had recommended the abolition of literacy tests. Furthermore, most states do not have and never have had a literacy requirement as a precondition for voting. This shows that no "compelling state interest," in terms of either the quality of the electorate or administrative convenience, necessitates disfranchisement of persons unable to read and write.

[30] See, *e.g.*, House Hearings, p. 56 (Mr. Glickstein) and p. 222 (Attorney General Mitchell); Sen. Hearings, p. 185 (Attorney General Mitchell), and 468 (Bar Assn. of City of N.Y.).

CONCLUSION

For the foregoing reasons, the motions for leave to file the complaints, motions for expedited consideration and motion for interim relief should be granted.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

JERRIS LEONARD,
Assistant Attorney General.

DAVID B. MARBLESTONE,
JEREMY I. SCHWARTZ,
Attorneys.

AUGUST 1970.

APPENDIX A

VOTING RIGHTS ACT AMENDMENTS OF 1970, P.L. 91–285, 84 STAT. 314

AN ACT To extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Voting Rights Act Amendments of 1970".

SEC. 2. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by inserting therein, immediately after the first section thereof, the following title caption:

"TITLE I—VOTING RIGHTS".

SEC. 3. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by striking out the words "five years" wherever they appear in the first and third paragraphs thereof, and inserting in lieu thereof the words "ten years".

SEC. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: "On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any

test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."

SEC. 5. Section 5 of the Voting Rights Act of 1965 (79 Stat. 439; 42 U.S.C. 1973c) is amended by (1) inserting after "section 4(a)" the following: "based upon determinations made under the first sentence of section 4(b)", and (2) inserting after "1964," the following: "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968,".

SEC. 6. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by adding at the end thereof the following new titles:

"TITLE II—SUPPLEMENTAL PROVISIONS

"APPLICATION OF PROHIBITION TO OTHER STATES

"SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.

"(b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate

the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

"RESIDENCE REQUIREMENTS FOR VOTING

"SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

"(1) denies or abridged the inherent constitutional right of citizens to vote for their President and Vice President;

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

"(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each

State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice Pres-

ident, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

"JUDICIAL RELIEF

"SEC. 203. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2282 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

"PENALTY

"SEC. 204. Whoever shall deprive or attempt to deprive any person of any right secured by section 201

or 202 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"SEPARABILITY

"SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it

is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"SEC. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"SEC. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Approved June 22, 1970.

APPENDIX B

Article 7, Section 2 of the Arizona Constitution provides: No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word 'citizen' shall include persons of the male and female sex.

The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Sections 16–101 and 16–107 of the Arizona Revised Statutes provide as follows:

§16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.

2. Will be twenty-one years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

§ 16-107. Closing of registrations

A. No elector shall be registered to vote in a primary election between five o'clock p.m. of the day which is four months preceding the date of the next general election and six o'clock p.m. of the day of the primary election.

B. No elector shall be registered between five o'clock p.m. of the seventh Monday preceding a general election and six o'clock p.m. of the day thereof. As amended Laws 1958, Ch. 48, § 1.

APPENDIX C

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Sections 34-401, 34-408, 34-409, 34-1101 and 34-1105 provide in pertinent part:

34-401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days,

where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34-408. Eligibility of new residents to vote.—Each citizen of the United States who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state, except the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34-409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34-1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is

required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 46, Original

UNITED STATES, PLAINTIFF

v.

STATE OF ARIZONA, DEFENDANT

No. 47, Original

UNITED STATES, PLAINTIFF

v.

STATE OF IDAHO, DEFENDANT

BRIEF FOR THE UNITED STATES

JURISDICTION

The government's complaints were filed August 17, 1970. On August 25, 1970, the Chief Justice entered an order setting the cases for oral argument on October 19, 1970, together with original actions brought by Oregon and Texas (*Oregon* v. *Mitchell,* No. 43, Original; *Texas* v. *Mitchell,* No. 44, Original) and directing that any oppositions to the motions for leave to file, answers, and briefs be filed at stated times prior to that date. On August 26, 1970, Arizona urged

the Court to permit the filing of the government's complaint; on August 28, 1970, Idaho also moved that the government's complaint against it be accepted.

This Court has original jurisdiction over a suit brought by the United States against a state. Const. Art. III, Section 2; see also 28 U.S.C. 1251(b)(2).

QUESTION PRESENTED

Whether the Voting Rights Act Amendments of 1970, 84 Stat. 314, are constitutional insofar as they (1) suspend the use of literacy tests as prerequisites for voting in states or their political subdivisions not subject to suspension under the Voting Rights Act of 1965, (2) restrict durational residency requirements in regard to voting for President and Vice President and prescribe uniform standards regarding absentee registration and absentee balloting in presidential elections and (3) prohibit the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in pertinent part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment provides as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

The Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314, *et seq.*, are set forth in Appendix A, *infra*, pp. 77–85.

The pertinent provisions of Article 7, Section 2 of the Arizona Constitution and Sections 16–101 and 16–107 of the Arizona Revised Statutes are set forth in Appendix B, *infra*, pp. 86–87.

The pertinent provisions of Article 6, Section 2 of the Idaho Constitution and Sections 34–401, 34–408, 34–409, 34–413, 34–1101, 34–1105 of the Idaho Code are set forth in Appendix C, *infra*, pp. 88–90.

STATEMENT

The United States has invoked the original jurisdiction of this Court seeking declaratory and injunctive relief to enforce the Voting Rights Act Amendments of 1970, 84 Stat. 314. The defendant states, through their Attorneys General, have formally advised the Attorney General of the United States that

they will not comply with portions of the act, necessitating these actions for its enforcement.

I. THE STATUTE AND ITS EFFECT

The Voting Rights Act Amendments of 1970 were signed by the President on June 22, 1970. Title I of the new law extends for five years the operation of Section 4(a) and related sections of the Voting Rights Act of 1965,[1] a principal effect of which was to suspend the use of literacy tests in six southern states and parts of three other states. Sections 3, 4 and 5 of the 1970 Amendments. This title is not at issue in the present suits. The 1970 Amendments also add two new titles to the 1965 Act, and these are the focus of the present disputes. Title II suspends the use of literacy tests in all states and counties not subject to suspension by reason of the 1965 Act, Section 201, and seeks to assure the right to vote in future presidential elections to otherwise qualified voters who change their residence in the months preceding the election, or who cannot register or vote in person. Section 202. Title III prohibits the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election occurring after December 31, 1970.

A. SECTION 201—LITERACY

Section 201 suspends, until August 6, 1975, the use of literacy tests and any similar "test or device".[2]

[1] 79 Stat. 438, 42 U.S.C. (Supp. V) 1973b(a).

[2] The term "test or device" is defined in Section 201(b) and includes any prerequisite for voting which involves literacy,

in any state or political subdivision not subject to suspension by reason of Section 4(a) of the 1965 Act.[3] The literacy test areas which are covered by Section 201 are the States of Alaska, Arizona (except Yuma County), California, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Oregon, Washington and Wyoming, and 61 counties in North Carolina.[4] It has been estimated that more than 1.9 million persons otherwise eligible to vote in these states (excluding North Carolina)—including 73,200 persons in Arizona—are unable to

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educational achievement, moral character or proving qualification by voucher of other persons. The definition is identical to that contained in Section 4(c) of the 1965 Act, 42 U.S.C. (Supp. V) 1973b(c).

[3] The jurisdictions presently subject to suspension under Section 4(a) of the Voting Rights Act are the States of Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, 39 counties in North Carolina, one county in Arizona, and one county in Hawaii.

The date when the period of suspension under Section 201 is to end, August 6, 1975, corresponds for the most part with the time of operation of Section 4(a), as amended, since literacy tests in most of the jurisdictions subject to Section 4(a) will have been suspended for 10 years as of that date.

[4] A table setting forth the state laws providing for a "test or device" is contained in the Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., p. 90. (Hereinafter "House Hearings.") The literacy requirement of the Hawaii Constitution (included in the above-cited table) was repealed as a result of a referendum on November 5, 1968. The statutory provision implementing the literacy requirement was deleted in 1969. See Hawaii Rev. Stat., § 11-4, as amended.

qualify under present state laws because of their illiteracy.[5]

B. SECTION 202—RESIDENCE AND ABSENTEE PARTICIPATION

The objective of Section 202 is twofold. First, it is intended to insure that no citizen otherwise qualified to vote for President and Vice President will be prevented from doing so because of a change of residence within the United States, or because of a state or local residence requirement of more than 30 days. Section 202(c). Second, it requires each state to provide for absentee registration and prescribes uniform standards for absentee balloting in presidential elections. Sections 202(c) and (f).

1. Residency

Section 202(c)'s provisions regarding the requirement of state residence in presidential elections are implemented by Sections 202(d) and (e). Section 202(d) requires each state to provide for the registration (or other means of qualifying) of all otherwise qualified residents who apply at least 30 days before a presidential election for registration to vote in that election—in effect, creating a maximum durational residency test of 30 days for presidential elections. Section 202(e) provides that any otherwise qualified person who moves to a state or political subdivision within 30 days of a presidential election, and

[5] See Hearings on Amendments to the Voting Rights Act before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess., p. 216 (hereinafter "Voting Rights Hearings"). These estimates are likely to be high, since they are based on census tables reflecting educational levels and do not account for the possibility of lenity or nonenforcement of the literacy requirement.

by virtue of that fact is not eligible to vote in his new location, must be allowed to vote for President and Vice President, in person or by absentee ballot, in the state or political subdivision of his prior residence. Section 202(e) does not apply to persons whose previous residence did not entitle them to vote—for example, citizens resident in Puerto Rico or London, England, who have no right to absentee voting or to registration elsewhere. With this exception, Sections 202 (d) and (e) make it possible for any otherwise qualified person to vote in a presidential election, regardless of the date on which he changes his residence.

The requirement that 30-day residents be qualified to vote in presidential elections will affect the laws of thirty-eight states (and the District of Columbia).[6] In only 12 states do existing laws provide for a residency period of 30 days or less in regard to voting by new residents in a presidential election.[7] In a bare majority

[6] According to a study submitted by Senator Goldwater, 16 states prescribe one year's residence in the state as a precondition for voting for President and Vice President; and, in one state (Mississippi), the minimum period is two years. In three states, a new resident's eligibility to vote in a presidential election is conditioned upon his satisfying a six-month waiting period. In Massachusetts the period is only 31 days. See 116 Cong. Rec. 3542–3543 (daily ed., March 11, 1970), table 1.

Table 1, cited above, lists 37 states and the District of Columbia as requiring more than 30 days' residence for voting in presidential elections. Subsequently, the Florida statute was amended to provide for a minimum of 45 days (as opposed to the prior minimum of 30). See Fla. Stat. Ann., § 97.031(2) as amended by Ch. 69–280, 1969 Sess. Laws.

[7] In two states (Oregon and Wisconsin), the existing requirement as to presidential elections is one day. (See Ore. Rev. Stat., § 247.420(1), as amended by Ore. Laws 1969, Ch. 153.)

of the states (27), Section 202 also affects local residence rules requiring longer than 30 days residence in a new county, city or precinct within the same state.[8] Section 202 renders all such provisions unenforceable in presidential elections. The state provisions affected would disfranchise as many as 5 million American citizens in a presidential election today.[9]

2. Absentee participation

The portions of Section 202 which relate to absentee registration and absentee voting in presidential elections apply to all state residents, whether recent or long-term, who are absent from their election dis-

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Five other states (Alaska, Hawaii, Nebraska, North Dakota and Oklahoma) have requirements of less than 30 days. The remainder (Georgia, Maine, Michigan, Minnesota and New Hampshire) prescribe a 30-day period. 116 Cong. Rec. 3542 (daily ed., March 11, 1970), table 1. Section 202(g) provides that: "Nothing in * * * [Section 202] shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein."

[8] See 116 Cong. Rec. 3542 (daily ed., March 11, 1970), table 2. The cited table shows Florida as requiring six months' residence in the county. The Florida statute was subsequently amended so as to permit a registered voter who moves from one Florida county to another to vote for President (and statewide offices) in the county of former residence, during the six months after the move. See Fla. Stat. Ann., § 97.100 as added by Ch. 69–280, 1969 Sess. Laws.

[9] 116 Cong. Rec. 3003 (daily ed., March 4, 1970; Sen. Baker), *id.* at 3538 (daily ed., March 11, 1970; Sen. Randolph); see Bureau of the Census, *Estimates of the Population of Voting Age*, Current Population Reports, Series P–25, No. 406 (1968), table 1 (but see footnote 1 of the table); and *Voting and Registration in the Election of November 1968*, Series P–20, No. 192 (1969), table 16. See also Gallup Opinion Index, Report No. 42 (1968), p. 6.

See also Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 824–830 (1963).

tricts at or prior to the election. Section 202(d) requires each state to provide for absentee voting by any duly qualified resident "who may be absent from * * * [his] election district * * * [on election day]," who has applied for such ballot at least seven days prior to the election and who returns the ballot to the appropriate official before the polls close. Section 202(f) requires the states to make some form of absentee registration available to all persons entitled to vote absentee in a presidential election. These provisions affect state laws in many ways—for example, only 20 states presently allow civilians generally to register absentee. "Approximately 3 to 5 million * * * fully qualified American citizens" are affected by the absentee voting provision alone. 116 Cong. Rec. 3538 (daily ed., March 11, 1970); see also *id.* at 2884 (daily ed., March 3, 1970).

C. TITLE III—AGE

Section 302 of the Act prohibits a denial of the right to vote to any citizen of the United States 18 years of age or older who is otherwise qualified to vote in any state or political subdivision. The provision is to take effect with respect to any election or primary held on or after January 1, 1971 (Section 305), and will result in lowering the voting age from 21 to 18 in forty-six states and the District of Columbia, and from 20 to 18 in the State of Hawaii. The States of Georgia, Kentucky and Alaska will not be affected by Section 302 since 18-year olds there already have the vote. (Alaskan voters approved a referendum reducing the voting age to 18 in its primary elections held August 25, 1970.) It has been estimated that close to 10 million persons who would

be eligible to vote under this provision are presently disfranchised because of age alone. Voting Rights Hearings, p. 328; 116 Cong. Rec. 3060 (daily ed., March 5, 1970; Sen. Kennedy).

II. LEGISLATIVE HISTORY

The Voting Rights Act Amendments of 1970 had their genesis in bills to extend the operation of the literacy test and related provisions of the 1965 Act.[10] After considering alternative proposals, the House of Representatives enacted a bill which would have replaced Section 4(a) and its enforcement provisions with a nationwide suspension of literacy tests.[11] This bill also provided for controls on state laws imposing durational residency requirements as they applied to presidential elections.[12]

The legislation took its present form in the Senate, after extensive hearings [13] and debate. While agreeing that the requirement of literacy as a precondition to

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[10] See H. Rep. No. 397, 91st Cong., 1st Sess. (1969) p. 2.

[11] See H.R. 4249, as passed by the House of Representatives on December 11, 1969. 115 Cong. Rec. 12184 (daily ed.). The substance of the bill adopted by the House is set forth at 115 Cong. Rec. 12074 (daily ed., December 10, 1969).

[12] As passed by the House, H.R. 4249, *supra*, Section 2(c), would have prohibited states from denying the vote in presidential elections on account of residence to anyone who had established residence by September 1 of the presidential election year, or who had maintained his residence until that date and could not qualify elsewhere. The section required provision for absentee registration, but made no general provision for absentee voting.

[13] Voting Rights Hearings; Hearings on Lowering the Voting Age to 18 before the Subcommittee on Constitutional Amendments

voting inevitably has discriminatory effects upon minority groups and the poor wherever applied, yet reflects no sufficient interest of the states,[14] the Senate concluded that Section 4(a) and its enforcement provisions should be retained where applicable. It therefore provided both for continued operation of Section 4(a) of the 1965 Act and for temporary suspension of literacy tests in all jurisdictions not subject to that section. The Senate also concluded that somewhat more restrictive limitations should be imposed on state residency requirements and absentee participation provisions than had been adopted by the House.[15]

It was in the Senate that the matter of voting age restrictions first arose. The question of restricting the states' authority to deny the vote on account of age had arisen in the Voting Age Hearings and in the Voting Rights Hearings, nos. 5, 13, *supra*, and in both it had been suggested that this might be accomplished by statute rather than by constitutional amendment.[16] Beginning on March 4, 1970, and especially on March 11, the question was debated on the Senate

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of the Senate Judiciary Committee, 91st Cong., 2d Sess. (1970) (hereinafter, "Voting Age Hearings.")

[14] See, *e.g.*, 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (statement of ten members of Senate Judiciary Committee).

[15] See, *e.g.*, 116 Cong. Rec. 3537 (daily ed., March 11, 1970) (Sen. Goldwater). Compare Section 202 with Section 2(c) of the House bill, n. 12, *supra*.

[16] See, *e.g.*, Voting Age Hearings, pp. 134, 158, 221 (Sen. Goldwater; Sen. Kennedy; Rep. Railsback); Voting Rights Hearings, pp. 322, 330 (Sen. Kennedy; Prof. Cox); but see Voting Age Hearings, pp. 233–249; 249–273 (Assist. Atty. Gen. Rehnquist; Dean Pollak).

floor.[17] In these debates, there was apparently almost universal agreement that continued denial of the right to vote, on account of age, to persons aged 18, 19 and 20 was unwarranted.[18] The fundamental issue was whether elimination of that discrimination could properly be accomplished by legislation. The Senate concluded that, in light of the maturity of and the obligations upon citizens between 18 and 21 years of age, the states lacked any compelling interest justifying disfranchisement; given that conclusion, it believed, Congress could restrict state authority to set a minimum age for voting under its Fourteenth Amendment enforcement power just as, on similar findings, it had restricted state authority to use literacy tests or to set residence standards in presidential elections.[19]

The measure was passed by the Senate, 116 Cong. Rec. 3585 (daily ed. March 13, 1970), and returned to the House of Representatives. There, after additional debate on the constitutionality of a statutory reduction of voting age, it was adopted without amendment. 116 Cong. Rec. 5679 (daily ed., June 17, 1970).

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[17] 116 Cong. Rec. 2938–2940 (daily ed., March 4, 1970); *id.* at 3474–3525, 3544–3548, 3552–3558, 3572–3585 (daily ed., March 11, 1970).

[18] See, *e.g.*, 116 Cong. Rec. 3517 (daily ed., March 11, 1970) (Sen. Randolph).

[19] *E.g.*, Voting Rights Hearings, pp. 330, 337 (Sen. Ervin), 702ff; 116 Cong. Rec. 3487 (daily ed., March 11, 1970; Sen. Kennedy); *id.* at 5643 (Rep. McCulloch), 5644 (Rep. Anderson), and 5644 (Rep. McClory) (daily ed., June 17, 1970).

THE ACT TO ARIZONA AND IDAHO

The Voting Rights Act Amendments authorize and direct the Attorney General to enforce their provisions. Sections 203 and 303(a)(1). In order to meet this responsibility, the Attorney General wrote to the Governor of each state seeking an affirmative assurance that the state would comply with it (See, *e.g.*, Exhibit A to each complaint in these suits). The Attorneys General of Arizona and Idaho replied that their states would not comply with portions of the statute (Exhibit B to each complaint). Accordingly, the United States instituted these actions against the States of Arizona and Idaho to enjoin operation of provisions of their constitutions and statutes that are inconsistent with the Voting Rights Act Amendments.

[20] Forty-eight states replied to the letters sent by Attorney General Mitchell.

With respect to Section 201's suspension of literary tests, ten of the thirteen affected states replied that they would comply with the federal statute and three states, including Arizona, refused to suspend their literacy requirements.

Regarding the residency and absentee provisions of Section 202, 28 states indicated that they would comply and three, including Idaho, stated that they would not comply. The letters of the remaining states either made no mention of Section 202 or were indefinite. (Four of the states which refused, on constitutional grounds, to implement Section 201 or Section 302 expressed willingness to comply with Section 202. This number includes Arizona, Oregon and Texas.)

Of the 47 states affected by Section 302's reduction of voting age, 46 responded. Twenty-three states said that they would carry out the federal statute. Seven states refused to accept its constitutionality. The remainder of the replies were in-

The suit against Arizona seeks to enforce compliance with Sections 201 and 302 of the Act, the literacy and voting age provisions.[21] (Arizona does not contest the validity of Section 202, the residency and absentee provision, although the state has conflicting laws, *e.g.*, Ariz. Rev. Stat. 16–172 (1969 Supp.).) Sections 16–101(A) (4) and (5) of the Arizona Revised Statutes require as a prerequisite to registration that an applicant must be able to write his name and to read the Constitution of the United States in the English language. Article 7, Section 2 of the Constitution of Arizona and Section 16–101(A)(2) of the Arizona Revised Statutes provide, as a prerequisite to registration and voting, that an otherwise qualified citizen must have attained the age of 21 prior to the ensuing general election.

The action against Idaho seeks to compel that state to implement Sections 202 and 302 of the Act. Article 6, Section 2 of the Idaho Constitution and Section 34–401 of the Idaho Code provide that, as a prerequisite to registration and voting, otherwise qualified citizens must have attained the age of 21 prior to the ensuing general election. While Idaho has a spe-

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definite, many of them indicating that the state's action would depend upon the timing of this Court's adjudication of the validity of the statute.

[21] Because Section 201 took effect upon enactment, the United States sought interim relief requiring Arizona to permit illiterate, but otherwise qualified, persons to register on a provisional basis in order to preserve the possibility that they might vote in the November 3, 1970, general elections. Arizona stated that it would make arrangements to permit such registration and, by order of August 21, 1970, Mr. Justice Douglas granted the motion for interim relief.

cial provision permitting new residents of the state to vote for President and Vice President, the minimum period of residency prescribed is 60 days. Ida. Const. Art. 6, § 2 (as amended in 1962), Ida. Code, § 34-408. Idaho makes no provision for voting in presidential elections by former Idaho residents who do not satisfy the registration requirements of their new location. Nor is voting in presidential elections permitted for persons who, within 30 days of the election, move from one Idaho county to another. (A previously registered voter who moves *within* an Idaho county, less than 30 but more than 3 days before an election, may transfer his registration to the new precinct. Ida. Code, § 34-809.) Idaho law does not permit persons who have lived within the state for less than six months to register by mail, Ida. Code, § 34-409, or to vote by absentee ballot, Ida. Code, § 34-413, and requires that all absentee ballots be returned by noon of election day. Ida. Code § 34-1105 (1969 Supp.).

SUMMARY OF ARGUMENT

I

The legal principles by which the constitutional validity of all three challenged provisions of the 1970 Amendment can be established are, we believe, essentially the same for each.

First, Congress' authority to enforce the Fourteenth and Fifteenth Amendments is fully as extensive as its authority to carry out its Article I powers under the Necessary and Proper Clause. In *South*

Carolina v. *Katzenbach*, 383 U.S. 301, this Court unanimously agreed that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States." 383 U.S. at 326, 355. *Katzenbach* v. *Morgan*, 384 U.S. 641, established the same principle with respect to Section 5 of the Fourteenth Amendment. *Morgan* held that Congress' authority extends not only to devising remedies, but also to identifying violations of the constitutional guarantee. In each instance, the Court held, it was sufficient that the Court be able to "perceive a basis" on which Congress had acted. 384 U.S. at 653, 655-656. In sum, Section 5 is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U.S. at 651.

Second, it is by now firmly established that exclusions from the franchise are warranted under the Equal Protection Clause only if supported by "compelling" state interests. The unanimous opinion of this Court last Term in *Evans* v. *Cornman*, 398 U.S. 419, 422, recognizes "no doubt at this date that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' * * * And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." As *Kramer* v. *Union School*

District, 395 U.S. 621, 627–628, explained, before a state classification of potential voters which excludes some persons from the franchise can be upheld, "the Court must determine whether the expulsions are necessary to promote a compelling state interest." 395 U.S. at 627.

While *Kramer* reserved decision regarding the standard of review to be applied in assessing general state voting qualifications as to literacy, residency, and age, 395 U.S. at 625; compare *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, we believe that the more stringent standard of review properly applies in that assessment. The difference between the qualifications involved here and those examined in prior cases is one only of degree. State power over suffrage, as in other areas of primary state responsibility, may be exercised only within the limitations prescribed by the Constitution. The right to vote in general elections is plainly no less important than the right to vote in special elections, or to cast a vote that is given its appropriate weight. Compare *Reynolds* v. *Sims,* 377 U.S. 533; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663.

Of course, the states do have a significant interest in voting qualifications in the abstract. But that observation does not solve the constitutional question posed in concrete cases. That question can be answered only by examining the *particular* exclusion adopted, and its relationship to the state's interest in limiting the franchise to those classes which will vote responsibly

and honestly. For the assessment required by the Equal Protection Clause cannot be made in the abstract; while some standards of residency or age will pass muster in some or all circumstances, others will not.

Congress is particularly well suited to make this inquiry. At least as to the residency and age issues, it was necessary to fix the line at which state interests could no longer be said to be "compelling." This assigning of numerical limits comfortably fits the legislative function, however difficult it may be for the judiciary. Moreover, the congressional action here merely limits state power to exclude persons from the franchise, and does not purport to restrict the franchise itself. If Congress had declared that such-and-such a class must be denied the vote, entirely different questions would be presented. But there is no issue here of congressional power to *require* a literacy test, a stated period of residency, or a certain level of age. *Morgan, supra,* 384 U.S. at 651–652, n. 10. Congress' constitutional power to impose on state laws those restrictions which enforce the Equal Protection Clause and the Fifteenth Amendment is fully recognized by the prior opinions of this Court.

II

Section 201's suspension of literacy tests is a valid exercise of Congress' power to remove unwarranted restrictions on the right to vote. This Court's opinion in *Gaston County* v. *United States,* 395 U.S. 285, both called attention to the residual effects of school

segregation, and held that those effects justify the suspension of literacy tests under Section 4(a) of the 1965 Act, whether or not the tests themselves are objectively administered. That holding controls here.

In enacting Section 201, Congress learned that states and localities not subject to Section 4(a) had practiced discrimination in the provision of education, and that similar residual effects were found in those areas. The migration of citizens who had suffered this discrimination was also a matter of concern. This Court noted in *Gaston County,* 395 U.S. at 293, n. 9: "It would seem a matter of no legal significance that [potential voters in Gaston County] may have been educated in other counties or States also maintaining segregated and unequal school systems." And Congress heard that substantial numbers of Negroes had migrated to states outside of the South, where their ability to satisfy literacy tests suffered on account of their prior unequal educational opportunities. Taken together, these factors gave ample basis to find that the use of literacy tests penalizes minority groups for their failure to attain the same levels of education attained by others throughout the country, even though the educational opportunities available to them were inferior. Especially given *Gaston County,* and the broad grant of legislative power contained in the Fourteenth and Fifteenth Amendments, Congress had all necessary authority to remedy these effects by suspending the use of literacy tests nationwide.

An independent and alternative basis for Section 201 is Congress' conclusion that the possible interests

of the state in maintaining literacy requirements are not sufficient to justify the resulting disfranchisement. That conclusion finds its basis in the testimony of many witnesses that the widespread availability of radio and television and the coverage given to both local and national issues in those media make it no longer necessary that a person be able to read in order to be informed. The conclusion is reinforced by the experience of the states—of states not subject to Section 4(a) of the 1965 Act, very few have statutes requiring literacy tests, and those which do have them often do not enforce them. The history of those tests as, primarily, a means for disfranchising various racial, ethnic and religious groups also casts serious doubt on the notion that they are required to assure an intelligent electorate.

III

While several constitutional bases are stated for Section 202, Congress' principal reliance was on its authority to enforce the Equal Protection Clause. It found that the states lack any compelling interest warranting classifications more restrictive of the right to vote in presidential elections on the basis of duration of residence or absence from the polls than those set forth in the section.

The section relates only to elections for President and Vice President. Thus, there can be no proper reliance on such considerations as a need for knowledge of local politicians and issues. The other possible justification for the state measures which come under the control of Section 202 is administrative

convenience—either the need for adequate time in which to investigate proposed voters and do necessary paperwork, or the need for time in which to discover and prevent fraud. Upon these issues, Congress carefully considered the experience of the states and, on that basis, determined that times longer than those which it proposed were not justified. So far as the prevention of fraudulent practices is concerned, that can readily be accomplished by measures which do not result in the wholesale disfranchisement of voters who would never consider such practices. See, *Shapiro* v. *Thompson,* 394 U.S. 618, 637. In general, the possible interest of a state in avoiding administrative tasks is not the type of interest which warrants denial of the right to vote. *Carrington* v. *Rash,* 380 U.S. 89, 96.

Since, at the least, this Court can "perceive a basis" for the congressional action embodied in Section 202, it is unnecessary to reach the other possible constitutional bases for the section, which are stated in its preamble but did not figure importantly in the debates. The first of these is that, as selection of the President and Vice President is an especially federal event, the Congress has special powers to govern that election. See, *Ex parte Yarbrough,* 110 U.S. 651, *Burroughs and Cannon* v. *United States,* 290 U.S. 534. To the extent the states have chosen to make the process elective, the right to participate in presidential elections is a privilege of national citizenship whose exercise Congress may regulate. Second, the questions of residence and absentee voting each have an evident relationship to the constitutional right to travel freely among the several states, which this Court has consist-

ently identified as "fundamental." *Shapiro* v. *Thompson,* 394 U.S. 618, 627, 629–631. As in the case of the right to vote, because the right is fundamental, any state regulation which tends to impose a penalty on its exercise must be supported by a "compelling" state interest. In presidential elections, for the reasons shown above, states have no such interest in their residency and absentee provisions which conflict with section 202.

IV

Title III is also a proper exercise of Congress' power to enforce the rights guaranteed by Section 1 of the Fourteenth Amendment. Although most states presently set the minimum voting age at 21, Congress found that this level no longer has any rational connection with the state's interest in promoting mature and responsible use of the ballot. Persons between the ages of 18 and 21 are called upon to bear heavy burdens of military service and have reached a level of educational and intellectual achievement which compares very favorably with that reached by the 21-year olds of 100 years ago. The majority of them are counted in the work force, where they receive salaries which account for substantial amounts of taxes paid to federal, state and local governments. They are adults for purposes of the criminal laws, and many other laws adopted by the state and federal governments. Those states which have had practical experience with the matter uniformly report that extension of the franchise to persons between 18 and 21 has been successful.

In sum, it can no longer be said that there exists a valid basis on which to differentiate the 18-20-year-old group from the 21-year-old group on grounds of maturity and political awareness, or that that class is "substantially less interested" than other state residents in the many electoral decisions affecting state laws on crime, taxes, unemployment, workmens' compensation and education, to mention but a few examples. Cf. *Evans* v. *Cornman, supra,* 398 U.S. at 423–425. These findings warrant the enactment of Title III; in any event they surely enable this Court to "perceive a basis" on which the Congress might have enacted that title.

ARGUMENT I. INTRODUCTION AND GOVERNING CONSTITUTIONAL PRINCIPLES

Two lines of authority in this Court converge on the issues presented in these cases. One, represented by *South Carolina* v. *Katzenbach,* 383 U.S. 301, *Katzenbach* v. *Morgan,* 384 U.S. 641, and *Ex Parte Virginia,* 100 U.S. 339, 345–346, *inter alia,* makes clear Congress' broad power to enforce the prohibitions of the Fourteenth and Fifteenth Amendments, including that embodied in the Equal Protection Clause. The other, stated as recently as this Court's unanimous decision last Term in *Evans* v. *Cornman,* 398 U.S. 419, recognizes "no doubt at this date that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' * * * And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests

served by it must meet close constitutional scrutiny." 398 U.S. at 422. These lines of authority firmly establish the constitutional basis of the 1970 Amendments.

A. CONGRESS' AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS IS FULLY AS EXTENSIVE AS ITS AUTHORITY TO CARRY OUT ITS ARTICLE I POWERS UNDER THE "NECESSARY AND PROPER" CLAUSE.

With the renewal of litigation over the scope of Congress' authority to enforce the Civil Rights Amendments, it has become clear that that authority is congruent with its power, generally, to make laws for carrying into execution the powers granted to it by the Constitution. The Thirteenth, Fourteenth, and Fifteenth Amendments each specifically grants Congress the power to enforce its provisions by appropriate legislation. Thirteenth Amendment, Section 2; Fourteenth Amendment, Section 5; Fifteenth Amendment, Section 2. It was early recognized that these enforcement clauses enlarged the powers of Congress, that "[s]ome legislation is contemplated to make the amendments fully effective." *Ex Parte Virginia,* 100 U.S. 339, 345; see also *Slaughter-House Cases,* 16 Wall. 36, 81; *Civil Rights Cases,* 109 U.S. 3, 11; *Strauder* v. *West Virginia,* 100 U.S. 303; *Clyatt* v. *United States,* 197 U.S. 207. In *South Carolina* v. *Katzenbach, supra,* and *Katzenbach* v. *Morgan, supra,* reflecting the renewal of civil rights legislation after Reconstruction, this Court held that that enlargement of power made Congress' authority coextensive with that which it enjoys under the Necessary and Proper clause of the Constitution. Art. 1, Sec. 8, Para. 18.

See Cox, *Constitutional Adjudication and the Promotion of Human Rights,* 80 Harv. L. Rev. 91 (1966); *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1072–1076 (1969).

The principle was first established with respect to the enforcement clause of the Fifteenth Amendment. In *South Carolina* v. *Katzenbach, supra,* the Court upheld provisions of the Voting Rights Act of 1965—including a suspension of literacy tests in states and counties which came within a specified coverage formula, 42 U.S.C. (Supp. V) 1973b(a)—as an appropriate exercise of Congress' enforcement authority:

> The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:
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> > "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421.
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> * * * * *
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> We therefore reject South Carolina's argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not

> circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. * * * [383 U.S. at 326–327.]

It is, of course, a principle of general application that the Congress, when exercising its express powers, may paint with a broader brush than the courts. See *Everard's Breweries* v. *Day*, 265 U.S. 545; *Currin* v. *Wallace*, 306 U.S. 1; *United States* v. *Darby*, 312 U.S. 100; *Katzenbach* v. *McClung*, 379 U.S. 294, 303–304. That is, in part, a necessary corollary of the regulatory function of legislation. But it implies also a recognition that the marking of constitutional boundaries often involves judgments which are best left to the legislative branch. *South Carolina* v. *Katzenbach, supra; Fay* v. *New York*, 332 U.S. 261, 282–284; *Cox, op. cit. supra*, 80 Harv. L. Rev. at 105. Both factors figured importantly in the second of the two opinions here discussed, *Katzenbach* v. *Morgan*.

The *Morgan* case arose out of a challenge to the constitutionality of Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. (Supp. V) 1973b(e). Section 4(e) in effect prohibits the application of English language literacy tests to persons educated in Puerto Rico. In enacting it, Congress appeared to rely on its authority to "use its judgment as to what is equal protection of the laws * * *" (111 Cong. Rec. 11066, Sen. Javits) and to take the initiative in marking the limits of permissible state action under the Fourteenth Amendment (*id.* at 11062, Sen. R. Kennedy). In this Court, however, the appellees contended that congressional authority to prohibit enforcement of a state law under Section 5 of the fourteenth Amendment is restricted to situations

where a court has found or would find the state law to be unconstitutional. The Court expressly rejected that view:

> Neither the language nor history of § 5 supports such a construction. As was said with regard to § 5 in *Ex Parte Virginia,* 100 U.S. 339, 345, "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibition by appropriate legislation. Some legislation is contemplated to make the amendments fully effective." A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. * * * [384 U.S. at 648.]

Section 5 was described (384 U.S. at 651) as a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

The Court considered two bases for subsection 4(e) in *Morgan.* First, Congress might have believed it would enable Puerto Ricans in New York and the other states to eliminate, through increased voting strength, discriminatory treatment they received in public services (*e.g.,* schools). The Court stated that it was for Congress to weigh the various conflicting considerations, including alternative means of remedying discrimination in governmental services, and to determine whether subsection 4(e) was needed to

further the aim of the Equal Protection Clause. As to judicial review, "It is enough that [the Court] be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

Second, Congress might have believed that the English language literacy requirement was itself a deprivation of equal protection. Here, too, the Court held that there must be deference to congressional judgment. After referring to the fundamental importance of the right to vote, on the one hand, and possible interests of the state in requiring English literacy on the other, the Court said (384 U.S. at 655–656):

> Since Congress undertook to legislate so as to preclude the enforcement of the state law, and did so in the context of a general appraisal of literacy requirements for voting * * * to which it brought a specially informed legislative competence, it was Congress' prerogative to weigh these competing considerations. Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that [the New York requirement violated] the Equal Protection Clause.

Insofar as *Morgan* and *South Carolina* v. *Katzenbach* interpreted Congress' power to devise remedies for judicially cognizable violations of the Equal Protection Clause, they were unanimous. See 383 U.S. at 355, Black, J., dissenting; 384 U.S. at 666, Harlan and Stewart, JJ., dissenting. The only disagreement arose in *Morgan,* over the question whether congressional

authority also extends to the identification of violations of the Amendment's guarantee. The majority held that Congress' authority to find that state conduct violates equal protection rights is coextensive with its power to devise a remedy for such violations; in each respect, it is sufficient that the Court be able to "perceive a basis" on which the Congress might have acted. 384 U.S. at 653, 655–656. The two dissenters, while willing to give legislative findings due respect and to base judicial determinations upon them, *id.* at 668–669, felt that the judiciary must make its own determination whether or not equal protection rights have been violated. On the meager legislative record in that cause they characterized the congressional finding of a violation of equal protection rights as "mere *ipse dixit*" (*id.* at 671); while the dissent then concluded that the state action in question did not violate the Equal Protection Clause, it did so on the basis of a permissive equal protection test, under which "a state enactment or practice may be struck down * * * only if it cannot be justified as founded upon a rational and permissible state policy." *Id.* at 660.

B. RESTRICTIONS ON VOTING QUALIFICATIONS ARE WARRANTED UNDER THE EQUAL PROTECTION CLAUSE ONLY IF SUPPORTED BY A COMPELLING STATE INTEREST.

While the states unquestionably possess broad initiative to set qualifications for voting, as in all other election matters not the subject of a specific constitutional prohibition, it is settled that that initiative can be exercised only in a manner which does not offend constitutional strictures—in particular, here, the

Equal Protection Clause. *Evans* v. *Cornman, supra.* Indeed, that proposition seems beyond dispute; states could hardly have an exemption from the clause in a matter so important to our democracy as the conduct of elections.

What has been at issue in this Court's recent decisions has been the standard by which the clause is to be applied. In the area of economics and social welfare, the classifications of a state law satisfy the equal protection requirement so long as they are "rationally based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U.S. 471, 487. In matters involving speech or personal liberty, on the other hand, a higher standard of precision is required, and the state may be required to justify the classifications it creates by some compelling interest sufficient to override the personal interests denied. *E.g., Shelton* v. *Tucker,* 364 U.S. 479; *Shapiro* v. *Thompson,* 394 U.S. 618; *Developments in the Law—Equal Protection, op. cit., supra.*

When faced with the choice between these two standards in recent voting cases, the Court's uniform response has been that the higher standard must be met. This Court long ago recognized that the franchise is a fundamental personal right and an essential attribute of citizenship.[22] *Yick Wo* v. *Hopkins,*

[22] We cannot agree with the observation sometimes made that the Constitution recognizes no right to vote. While it is true that "the Constitution * * * does not confer the right of suffrage upon any one," *Minor* v. *Happersett,* 21 Wall. 162, 178, in the sense of defining the qualifications for voting in federal and state elections, it expressly confers the vote in certain federal elections (Article I, Section 2; Seventeenth Amendment; see *United States* v. *Classic,* 313 U.S. 299, 314–315; *Lassiter,*

118 U.S. 356, 370; *Guinn* v. *United States,* 238 U.S. 347, 366; *United States* v. *Carolene Prod. Co.*, 304 U.S. 144, 152–153, n. 4. Thus, when the question of standards arose in the apportionment cases, the Court held that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U.S. 533, 562; see also *id.* at 554–555; *Wesberry* v. *Sanders,* 376 U.S. 1, 17; *Gray* v. *Sanders,* 372 U.S. 368.

While these cases dealt with the weighting of votes of persons qualified to vote under state law, the same result has been reached regarding state voting qualifications. For example, in *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, holding that general property or fee-paying qualifications for voting violated the Equal Protection Clause, the Court reiterated the

supra, 360 U.S. at 51) and implicitly requires it in the states as well. Article I, Section 2, and the Republican Form of Government Clause, together, surely require that at least one house of each state legislature be elective. *In re Duncan*, 139 U.S. 449, 461. And the Fifteenth and Nineteenth Amendments, as well as Section 2 of the Fourteenth, are otherwise incomprehensible. Indeed, the right to vote is also central to the First Amendment. As a comprehensive charter of freedom of political expression, that Amendment embraces not only the rights specifically enumerated, but also those additional rights necessary for their full exercise and enjoyment. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449; *NAACP* v. *Button*, 371 U.S. 415, 429–430. Voting is indisputably a form of political expression—for most people, the only practical form. The difficulty experienced by persons denied their proper vote in general elections in securing a remedy for that condition in the political arena is, indeed, one of the principal reasons why the Court has insisted upon the more stringent rule of review regarding voting matters. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 554–555; *Kramer* v. *Union School District*, *supra*, 395 U.S. at 639–640 (dissent).

need for close scrutiny and confinement of state classifications which denied to some the fundamental right to vote. 383 U.S. at 670. The unanimous opinion in *Evans* v. *Cornman,* last Term, holding that a state could not constitutionally interpret its own residence requirement to exclude persons living on federal enclaves who otherwise met its tests of residence, stated again that "before [the right to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." 398 U.S. at 422; compare *Carrington* v. *Rash,* 380 U.S. 89, 96.

This Court's strongest statement of the principle came in a case in which the state had sought to impose a qualification for voting in special elections in addition to the qualifications it ordinarily required in general elections:

> * * * [I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash, supra,* at 96.
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> * * * [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663, 670 (1966). The presumption of constitutionality and the approval given "rational" classifications in other types

> of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality. * * * [*Kramer* v. *Union Free School District,* 395 U.S. 621, 627–628; footnotes omitted.]

See also *Cipriano* v. *City of Houma,* 395 U.S. 701, 706; *Phoenix* v. *Kolodziejski,* 399 U.S. 204, 208–209. And see *Williams* v. *Rhodes,* 393 U.S. 23, 31.

We recognize that the holdings in these cases do not necessarily control the standards to be applied in the present cases. The three provisions of the Voting Rights Act Amendments here at issue directly affect the voting qualifications generally required of a state's citizens in areas which must be conceded to be, and which this Court has emphasized are, at least initially, legitimate matters of state concern: literacy, residency, and age. *E.g., Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45. And the majority in *Kramer* qualified its observations by repeated reference to the "special" nature of the voting qualification under examination and a reaffirmation of the states' general prerogatives in the areas of citizenship, age, and residency, 395 U.S. at 625.

We believe, however, that the more stringent standard of review properly applies in these cases as well. The right to vote is plainly no less central to the foundation of our representative society when denied in a general rather than a special election—rather,

more so, as the dissent in *Kramer* points out. 395 U.S. at 639, 640 n. 10. And a person excluded from voting in *all* elections is not less discriminated against than one who is permitted to vote in some, as in *Kramer*, or whose vote is given less than its appropriate weight, as in the reapportionment cases. This Court has several times invoked the Equal Protection Clause in cases involving total denial of the vote. See *Harper*, *supra*, 383 U.S. at 670; *Carrington* v. *Rash*, *supra*; *Evans* v. *Cornman*, *supra*. The difference between the qualifications involved here and those examined in prior cases is one only of degree. *Kramer*, *supra*, 395 U.S. at 637 (dissent). State power over suffrage, as in other areas of primary state responsibility, may be exercised only within the limitations prescribed by the Federal Constitution. Since it is the intrinsic importance of the vote to each citizen which has led this Court consistently to apply a more stringent standard of review,[23] that rule must also be applied in this case.

C. ALTHOUGH THE STATES HAVE A SIGNIFICANT INTEREST IN BASIC VOTING QUALIFICATIONS, CONGRESS IS THE APPROPRIATE BODY TO DETERMINE THE PRACTICAL LIMITS BEYOND WHICH PARTICULAR CLASSIFICATIONS REFLECTING THOSE INTERESTS ARE NO LONGER "COMPELLING" IN VIEW OF THE IMPORTANT PERSONAL RIGHTS INVOLVED

We do not mean to suggest by the above discussion that state residency, age, and literacy qualifications are *prima facie* suspect. There can be no doubt, as a general matter, that the states have the primary re-

[23] *E.g.*, *Reynolds* v. *Sims*, *supra*, 377 U.S. at 554–555, 561–562; *Harper* v. *Virginia Board of Elections*, *supra*, 383 U.S. at 667; *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 652–653; *Evans* v. *Cornman*, 398 U.S. at 422.

sponsibility for setting voting qualifications, and that in making the classifications required by that responsibility they also have a "compelling interest," in terms of the review standard, in limiting the franchise to those classes which will vote responsibly[24] and honestly. Comment, 1970 Utah L. Rev. 143, 146–147. The standard qualifications of citizenship, age, and residency, if not literacy,[25] directly respond to these interests.

To say in general, however, that a state has a compelling interest in assuring that its voters are qualified as to some standard—for example, residency—no more answers a specific question of constitutionality than to say, in general, that in First Amendment cases the government has a compelling interest in protecting itself against violent overthrow. The countervailing interest, the excluded citizen's fundamental interest in voting, remains constant whatever qualifying standard a state may adopt. As a particular standard is made more and more exclusive or, in the situation

[24] This Court has stated, and emphasized by repetition, that "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," *Carrington* v. *Rash*, *supra*, 380 U.S. at 94. As we understand the proposition, it refers to the fencing out of groups that might tend to vote for a particular party or point of view, and not to the fencing out of groups that would vote capriciously or without understanding.

[25] One of the bases for the suspension of state literacy tests is Congress' conclusion that, in an electronic age, there is no longer a "compelling interest" in literacy as a means of assuring an informed electorate. *Infra*, pp. 48–49; compare *Harper* v. *Virginia County Board of Elections*, *supra*. In any event, independent Fourteenth and Fifteenth Amendments grounds support Congress' action in suspending the literacy tests. *Infra*, pp. 40–48.

governed by Section 202, as it is applied to elections where knowledge of local issues is unneeded, the interest in *that particular standard* may no longer be compelling in comparison to the personal rights frustrated by its application. The assessment required by the Equal Protection Clause cannot be made in the abstract; it is a particular standard which must be examined. And it is evident that while some standards of residency (or age) will pass muster, in some or all circumstances, others will not.

It is at this point, we believe, that the involvement of the Congress becomes particularly significant. Like most legislation setting limits, voting qualifications embody a necessarily arbitrary element in stating the precise point at which eligibility begins. One is eligible after 365 days residency, not 363; at the age of 21, not 20. It is precisely the exclusion created by this element which is challenged on the equal protection ground; yet, even if it were agreed that a particular exclusion was too great for the state interests relied upon to justify it, the judiciary would have substantial difficulty in defining a new, and proper, line.[26] Congress, on the other hand, is well equipped

[26] Significantly, where the Court has not encountered such difficulties, it has not hesitated to act. In *Evans* v. *Cornman*, *supra*, the State of Maryland sought to distinguish between persons universally affected by its laws and persons resident on federal enclaves within the state, who were only partially so affected, by denying the vote to the latter group. Although it is undoubtedly possible to "perceive a basis" on which Maryland might have concluded that the latter group would have been less than fully responsible voters, this Court nonetheless unanimously concluded, on equal protection grounds, that the vote was improperly withheld. Its method was to apply essen-

to do so. Not only does its intimate acquaintance with electoral matters give it special competence in the area; unlike the judiciary, it is readily equipped to fix as a practical matter the lines of minimum qualification which it determines equal protection to require.[27] See Burt, *Miranda and Title II: A Morgantic Marriage,* 1969 The Supreme Court Review 81, 110–118. While the judiciary is institutionally ill-equipped, for example, to choose between 17 years and 18 years for purposes of a minimum standard of age, that is precisely a task for which the legislature is well suited; it involves the kind of line-drawing that Congress traditionally performs. Cf. *Ferguson* v. *Skrupa,* 372 U.S. 726, 729.

In making such choices, we emphasize, Congress is *not* supplanting the states' responsibilities in the area. With the few exceptions required by the Constitu-

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tially *federal* standards regarding the minimum content of state residence for the purpose of voting qualifications. In *Evans*, unlike the present cases, the entire excluded class either were or were not state residents; there was no necessity to draw or recognize a new or different line at which a state might properly divide those excluded from the vote from those who must be permitted to vote. But in terms of the application of federal rather than state standards to determine which classes must be permitted to vote, *Evans* is identical to these cases.

[27] It of course remains possible that the congressional minimum would still permit some persons to be excluded from the vote who might be thought suitably qualified for it. There may be, for example, many persons seventeen or younger fully as mature and responsible as those who presently exercise the franchise. The propriety of their exclusion from the vote by any state remains open as a judicial matter; what Congress has done, even if not as extensive as might be, cannot be impeached on that ground. *Morgan*, *supra*, 384 U.S. at 657–658.

tion, it is the states which determine which matters are to be presented to the electorate. The states, as well, have the initiative in declaring what voter qualifications are to be. The congressional role, reflected in this statute, is only to lift those state restrictions which it determines to violate, or to contribute to or perpetuate violations of, the Equal Protection Clause. This is in essence a setting of minimum standards, which in no way hinders states from going beyond them; a residence period of 10 days, or a voting age of 17 years, would be fully consistent with the federal statute should a state decide to adopt it. Cf. Section 202(g).

Most importantly, in setting minimum standards, Congress is not creating voting qualifications of its own. That is, in no respect do its acts *restrict* the franchise. There is no issue here of congressional power to *require* a literacy test, a stated period of residency, or a certain level of age for voting. We do not contend that Congress has any such power under the Equal Protection Clause. *Morgan, supra,* 384 U.S. at 651–652 n. 10. Unless given to Congress by other provisions of the Constitution, the power to *restrict* the franchise by the adoption of reasonable voting qualifications remains entirely in the states.

In its *Lassiter* opinion, this Court was careful to preserve the possibility of congressional action restricting state alternatives regarding voter qualification. It said, 360 U.S. at 51:

> [W]hile the right of suffrage is established and guaranteed by the Constitution * * * it is subject to the imposition of state standards which

> are not discriminatory *and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.* * * * [Emphasis supplied.]

Congress has constitutional power to impose those restrictions which enforce the Equal Protection Clause and the Fifteenth Amendment. It has done so here, by determining the extent to which the states lack a compelling interest in particular qualifications regarding literacy, residency, and age. As a result, these cases do not involve simply a collision between state laws and the unadorned constitutional provision. We now show in each instance that, with due regard for the legislative findings made,[28] Congress' determinations were correct. In any event, even if this Court might itself have reached a different assessment, under *Morgan* it must honor the congressional assessment so long as it can "perceive a basis" on which that assessment might have been made.

II. IN SUSPENDING LITERACY TESTS IN SECTION 201, CONGRESS VALIDLY EXERCISED ITS POWER UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REMOVE UNWARRANTED RESTRICTIONS ON THE RIGHT TO VOTE

In enacting Section 201, Congress concluded both that the imposition of literacy tests as a precondition

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[28] Compare *South Carolina* v. *Katzenbach*, *supra;* see generally, Karst, *Legislative Facts in Constitutional Litigation*, 1960 The Supreme Court Review 75; Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966); and Cox, *op. cit. supra*, 80 Harv. L. Rev. at 105.

for voting has a discriminatory impact on minority groups and that the imposition of these tests is not justified by any overriding state interests.[29] These findings were sound; Section 201 is constitutionally valid under either of the lines of authority discussed above.

A. CONGRESS PROPERLY DETERMINED THAT THE IMPOSITION OF LITERACY TESTS HAS THE EFFECT OF DISCRIMINATING AGAINST NEGROES, OTHER MINORITY GROUPS AND THE POOR

In *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 329, the Court noted that literacy tests had been purposely administered so as to disfranchise Negroes in most of the states covered by the Voting Rights Act of 1965. With respect to the states subject to suspension under Section 201, Congress did not have similar evidence of *intentional* abuse in the administration of such tests. As decisions of this Court following *South Carolina* v. *Katzenbach* have made clear,

[29] See the joint statement of the ten members (constituting a majority) of the Senate Judiciary Committee who supported the bill which included Section 201 and which, with modifications was ultimately adopted (116 Cong. Rec. 2758 (daily ed., March 2, 1970)):

> * * * this extension [of the suspension of tests to areas not covered by the 1965 Act] is justified for two reasons: (1) because of the discriminatory impact which the requirement of literacy as a precondition to voting may have on minority groups and the poor; and (2) because there is insufficient relationship between literacy and responsible, interested voting to justify such a broad restriction of the franchise.

Because of an agreement to discharge the bill by a fixed date, there was no Senate committee report on the Voting Rights Act Amendments. Thus, this statement by a majority of its members may be taken as expressing the views of the Senate Judiciary Committee on the abolition of literacy tests.

however, Congress' power to suspend literacy tests is not confined to the suspension of tests administered to effect *intentional* discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641; *Gaston County* v. *United States*, 395 U.S. 285.

In *Gaston County*, a suit under Section 4(a) of the Voting Rights Act of 1965, the Court refused to permit reinstitution of a literacy test. In seeking to establish that its literacy test had not been used during the preceding five years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color"—as Section 4(a) requires as a prerequisite to reinstitution—the county claimed that the test had been administered in a fair and impartial manner and that the county had made significant strides toward equalizing and integrating its school system. Noting that these claims fell "wide of the mark," this Court said:

> Affording today's Negro youth equal educational opportunities will doubtless prepare them to meet, on equal terms, whatever standards of literacy are required when they reach voting age. It does nothing for their parents, however. From this record, we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form. [395 U.S. at 296–297.]

The Court further indicated that it was immaterial where the educational "inequities" arose. Although

it was assumed that most of the adult residents of Gaston County had been educated there, "[i]t would seem a matter of no legal significance that they may have been educated in other counties or States also maintaining segregated and unequal school systems."[30] 395 U.S. at 293 n. 9.

In focusing on the proposed nationwide suspension of literacy tests, Congress was fully aware of the *Gaston County* decision and its implications.[31] It received substantial evidence that Negroes, other minorities, and the poor had been denied equal educational opportunities in various parts of the country and that substantial numbers of Negroes had migrated to states outside of the South imposing literacy tests. A review of that evidence demonstrates that Congress was justified in relying on the rationale of *Gaston County* to support the enactment of legislation under the Fourteenth and Fifteenth Amendments abolishing literacy tests as a precondition to voting.[32]

With respect to the discriminatory effects of literacy tests on Negroes, Attorney General Mitchell testified

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[30] In a prior footnote, however, the Court had stated: "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which a government bore no responsibility." 395 U.S. at 293, n. 8.

[31] See House Hearings, pp. 54–56 (testimony of Howard A. Glickstein), 221–225 (Attorney General Mitchell); Voting Rights Hearings, pp. 184–188 (Attorney General Mitchell); 116 Cong. Rec. 2770 (daily ed., March 2, 1970; Senator Hruska).

[32] Section 2 of the Thirteenth Amendment, authorizing Congress to deal with and eliminate the vestiges of slavery, might also have been relied upon.

before the House and Senate subcommittees considering the voting rights legislation that the *Gaston County* decision was relevant in several ways. First, he pointed out, the principle of that case is directly applicable to states or political subdivisions which had limited Negroes to inferior, *de jure* segregated schools. Prior to 1954, such school systems existed in southern and border states—including Delaware and North Carolina, two of the states affected by Section 201—and in the District of Columbia.[33] Clearly, the administration of literacy tests in Delaware and North Carolina would serve to perpetuate the "inequities" of the segregated schools formerly maintained by those states.

Second, the Attorney General noted that Congress could properly rely upon the fact that large numbers of Negroes have migrated from the South to other parts of the United States.[34] According to the Bureau of the Census, net migration of Negroes from the South between 1940 and 1969 totaled some 3.8 million persons.[35] Other evidence available to Congress established that part of this migration of Negroes was to northern and western states which employ literacy

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[33] House Hearings, p. 222; Voting Rights Hearings, p. 185. As to the inferiority of Negro schools in Delaware, see, *e.g.*, *Evans* v. *Ennis*, 281 F. 2d 385, 392, n. 2 (C.A. 3), certiorari denied, 364 U.S. 933.

[34] See House Hearings, p. 223; Voting Rights Hearings, p. 186.

[35] Bureau of the Census, *The Social and Economic Status of Negroes in the United States, 1969*, Current Population Reports, Series P–23, No. 29, p. 5.

tests.[36] That such persons received inferior education in segregated systems, both before and after 1954, is indicated by numerous court decisions.[37]

Finally, both the Attorney General [38] and other witnesses testified that denial of equal educational opportunity occurs not only in school systems which had *de jure* segregation, but also in systems characterized by *de facto* segregation or racial isolation. The latter condition exists throughout the United States,[39] in-

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[36] The 1960 Census, for example, indicates that even during the limited period, 1955–1960, there was substantial migration of Negroes from the South to such states as Arizona (4,388 persons, both adults and children), California (74,804), Massachusetts (7,418) and New York, (74,821). See Bureau of the Census, *1960 Census of the Population*, vol. I, pts. 4, 6, 23 and 34, table 100.

[37] See, *e.g.*, *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 471–472 (M.D. Ala.), affirmed, 389 U.S. 215; *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 891-892 (C.A. 5), affirmed on rehearing *en banc*, 380 F.2d 385, certiorari denied, 389 U.S. 840; *United States* v. *Mississippi*, 229 F. Supp. 925, 990 (S.D. Miss.) (dissenting opinion), reversed, 380 U.S. 128.

[38] See House Hearings, p. 224; Voting Rights Hearings, p. 186.

[39] Howard A. Glickstein, then Acting Staff Director of the United States Commission on Civil Rights, testified as follows (House Hearings, p. 56):

> * * * Nationally, a wide gap has existed—and continues to exist—between the quality of the public education afforded to white students and the quality of the public education available to Negroes, Mexican-Americans, and members of other minority groups.
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> Studies such as the Coleman report ["Equality of Educational Opportunity" (1966)] and the Commission's "Racial Isolation in the Public Schools" show the educationally harmful effects upon Negro students of attending—as they do across the Nation—schools isolated by race and

cluding the states whose tests are suspended by Section 201,[40] and is reflected in statistics on educational attainment.[41] Other persuasive evidence before Con-

social class. Evidence at our recent hearing in San Antonio, Tex., indicated that similar damage is being done to Mexican-American students.

In addition, evidence at Commission hearings in Cleveland, Boston, Rochester, and San Antonio indicates that schools attended predominantly by minority students often have inferior facilities. * * *

[40] Indeed even apart from the matter of *de facto* segregation, official discrimination against Negroes or Mexican-Americans has been found in a number of public school systems in literacy-test states other than southern or border states. See *Gonzales* v. *Sheely*, 96 F. Supp. 1004, 1007 (D. Ariz.) (inferior schools afforded Mexican-Americans); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal.) discrimination against Negroes); *Crawford* v. *Board of Education of the City of Los Angeles*, No. 822, 854, Super. Ct. for L.A. County (May 12, 1970) (discrimination against Negroes); *Taylor* v. *Board of Ed. of City Sch. Dist. of New Rochelle*, 294 F. 2d 36 (C.A. 2), certiorari denied, 368 U.S. 940 (racial segregation); and *Blocker* v. *Board of Education of Manhasset, New York*, 226 F. Supp. 208 (E.D. N.Y.) (racial segregation).

[41] Available data establishes that substantial disparities between the races exist throughout the United States with respect to years of school completed. See, *e.g.*, House Hearings, p. 224; Voting Rights Hearings, p. 186 (Attorney General Mitchell; Bureau of the Census, *Educational Attainment* (March 1968); Current Population Reports, Series P–20, No. 182 (1969), table 3.

The 1960 Census indicates that similar disparities exist in particular literacy-test states. In New York, for example, 10.9 percent of Negro adults had completed no more than 4 years of school, as opposed to 7 percent of the white adults. In California, the corresponding figures were 10.9 percent for Negroes and 4.9 percent for whites; in Arizona, 34.7 for nonwhites and 7.4 percent for whites; and in Massachusetts, the figures were 8.8 percent for Negroes and 5.6 percent for whites. 1960 Census of the Population, vol. I, pts. 4, 6, 23 and 24, tables 94, 102 and 103.

gress established that the discriminatory impact of literacy tests is not limited to Negroes, but falls as well upon the poor [42] and other minorities.[43] Cf. *Harper* v. *Virginia Board of Elections, supra,* 383 U.S. at 666.

A statement of Raymond Nakai, the Chairman of the Navajo Tribal Council, recited that Navajos in New Mexico (a state which has no literacy test) are much more likely to be registered voters than are members of the tribe residing in Arizona. According to Mr. Nakai, a major cause of the difference is the Arizona literacy requirement, which prevents Navajos who cannot read English or are unsure of their command of English from attempting to register. Voting Rights Hearings, p. 678. The Attorney General of Arizona

[42] The 1960 Census showed that only a small percentage of persons (25 and over) with substantial income ($7,000 to $9,999 per year) had completed no more than 4 years of school, but that a sizeable percentage of persons with income of $1,999 or less had had no more than 4 years of school.

In Arizona, only 1.3 percent of the persons with income of $7,000 to $9,000 had failed to complete more than 4 years of school, while 15.1 percent of the persons with income below $1,999 were in that category of education. For California, the corresponding percentages were 1.2 percent ($7,000–$9,999) and 9.2 percent ($0 to $1,999); the percentages for New York were 1.6 percent ($7,000–$9,000) and 11.5 percent ($0 to $1,999).

Bureau of the Census, *1960 Census of the Population*, vol. I, pts. 4, 6 and 34, table 138.

[43] A study conducted by the United States Commission on Civil Rights regarding northern and western states, based upon Bureau of the Census tabulations, indicated that "literacy tests do have a negative effect on voter registration and that this impact of literacy tests falls most heavily on blacks and persons of Spanish surname." See Voting Rights Hearings, pp. 399–407.

pointed out that: "Many of the older Indians were never privileged to attend a formal school * * *." Voting Rights Hearings, p. 675.

In short, Congress had ample evidence before it that the administration of literacy tests as a precondition to voting penalizes identifiable minority groups for their failure to attain the same levels of education attained by others, even though that failure is attributable to inferior educational opportunities. This evidence confirmed this Court's reasoning in *Gaston County* that the imposition of literacy tests to such persons (whether or not administered to effect intentional discrimination) perpetuates the discriminatory effects of educational inequities. Surely, given the broad grants of legislative power contained in the Fourteenth and Fifteenth Amendments, Congress was not powerless to remedy these effects of discrimination in education by suspending the use of literacy tests."

Nothing in this Court's decision in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45—holding that the North Carolina literacy test requirement was not unconstitutional on its face—compels a contrary conclusion. *Lassiter* did not involve the power of Congress to implement the Fourteenth and Fifteenth Amendments. 360 U.S. at 51; and see *Katzenbach*

"In light of the fact that Congress found the problem to be a substantial one in all states, its determination that the application of a uniform remedy to all of the states not covered by Section 4(a) would be "appropriate" surely was a permissible one—regardless of whether the dimensions of the problem are precisely the same in those states newly subject to the suspension as in those that were previously subject to it. Cf. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489–490.

v. *Morgan, supra,* 384 U.S. at 649. Nor was the matter of inequality of education [redacted] there put in issue. The Court did take judicial notice in *Lassiter* that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex," 360 U.S. at 51. That assertion, however, is now plainly rebutted both by *Gaston County* and by the record compiled by Congress in considering the Voting Rights Act Amendments.

B. NO COMPELLING STATE INTERESTS JUSTIFY THE IMPOSITION OF LITERACY TESTS

In addition to the purpose of Congres to eliminate the effects of unequal educational opportunity upon voter registration, Congress independently determined, as an alternate basis for enacting Section 201, that the possible interests of a state in maintaining a literacy requirement are not sufficient to justify the resulting disfranchisement. See 116 Cong. Rec. 2758 (daily ed., March 2, 1970).

At the hearings on the legislation, many witnesses stated that, in view of the widespread availability of radio and television and the coverage given to local and national issues, a person need not be able to read to be informed.[48] In recommending the abolition of literacy tests, the Report of the President's Commission on Registration and Voting Participation (November 1963) reached the same conclusion (p. 40):

[48] See, *e.g.*, House Hearings, pp. 59 (Mr. Glickstein) 222 (Attorney General Mitchell); and Voting Rights Hearings, pp. 185 (Attorney General Mitchell) 468 (Bar. Assn. of City of N.Y.).

> Many media are available other than the printed word to supply information to potential voters. The Commission is not impressed by the argument that only those who can read and write or have a sixth grade education should have a voice in determining their future. This is the right of every citizen no matter what his formal education or possession of material wealth. The Commission recommends that no literacy test interfere with the basic right to suffrage.[46]

Furthermore, most states do not have and never have had a literacy requirement as a precondition for voting. And certain of the states which retain such laws either have ceased applying the requirement (as in the case of Delaware and Oregon) or leave the matter to the discretion of local registrars (reportedly, the case in California). See House Hearings, pp. 96, 102 and 104; Voting Rights Hearings, pp. 407–409, 672, 676 and 677. This at least creates substantial doubt whether any "compelling state interest," in terms of either the quality of the electorate or administrative convenience, supports the classification which disfranchises persons unable to read and write.[47]

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[46] See also pp. 55–59 of the Report.

[47] The history of literacy requirements also puts the notion that the purpose of the requirements was to assure an intelligent electorate in serious doubt.

As a memorandum of the Commission on Civil Rights pointed out, even outside the South, "a primary motivation behind [literacy] requirements" was to render politically impotent "various racial, ethnic * * * [and] religious * * * groups." See Vot-

III. THE PROVISIONS OF SECTION 202 CONCERNING RESIDENCY REQUIREMENTS AND ABSENTEE REGISTRATION AND BALLOTING IN PRESIDENTIAL ELECTIONS ARE A PROPER EXERCISE OF CONGRESSIONAL AUTHORITY UNDER THE FOURTEENTH AMENDMENT

Section 202 as enacted refers to a number of alternative constitutional bases. Section 202(a). However, except for some mention of the alternative grounds by Senator Goldwater, who sponsored the residency and absentee-voting provisions in the Senate,[48] virtually all discussion of the constitutionality of Section 202, in both hearings[49] and debates,[50] pertained to the Four-

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ing Rights Hearings, pp. 413–414. See also *id.* at pp. 185–188 (Attorney General Mitchell); *Katzenbach* v. *Morgan*, *supra*, 384 U.S. at 654, *Castro* v. *State*, 85 Cal. Rptr. 20, 466 P. 2d 244, 248–249; Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 Notre Dame Law. 7 (1969).

[48] See Voting Rights Hearings, pp. 289–291; 116 Cong. Rec. 3541 (daily ed., March 11, 1970). In general, Senator Goldwater's discussion, too, dealt mainly with the Fourteenth Amendment and the decision in *Katzenbach* v. *Morgan*. See Voting Rights Hearings, pp. 284–289; 116 Cong. Rec. 3540-3541 (daily ed., March 11, 1970).

[49] House Hearings, p. 224, Voting Rights Hearings, p. 188 (Attorney General Mitchell); House Hearings, p. 277 and Voting Rights Hearings, p. 684 (Department of Justice memorandum); Voting Rights Hearings, p. 390 (Professor Cox); [*id.*, p. 302 (memorandum prepared by Library of Congress); p. 473 (Association of the Bar of the City of New York); and p. 702 (memorandum of Professor Cox)].

[50] *E.g.*, 116 Cong. Rec. 3391 (daily ed., March 10, 1970; Sen. Hart), 3487 (daily ed., March 11, 1970; Sen. Kennedy); 116 Cong. Rec. 5643 (Rep. McCulloch), 5644 (Rep. Anderson) and 5644 (Rep. McClory), (daily ed., June 17, 1970).

teenth Amendment and this Court's decision in *Katzenbach* v. *Morgan, supra.* Accordingly, we deal primarily with the Fourteenth Amendment ground and refer only briefly to the alternative constitutional theories.

A. CONGRESS CORRECTLY CONCLUDED THAT THE STATES LACK ANY COMPELLING INTEREST WARRANTING CLASSIFICATIONS MORE RESTRICTIVE OF THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS THAN THOSE SET FORTH IN SECTION 202.

1. Residency

Although this Court has repeatedly acknowledged the initiative of the states in setting residence qualifications for participation in all elections, including presidential elections,[51] in this respect as in all others Congress may impose restrictions on such qualifications if necessary and proper to enforce the provisions of the Constitution. *Lassiter, supra,* 360 U.S. at 51; see text and cases cited, *supra,* pp. 29–39. Without regard to whether lengthy state residence requirements violate the Equal Protection Clause or other constitutional rights in and of themselves as applied to presidential elections,[52] here Congress has made findings appropriate and adequate to the exercise of its enforcement power under the Fourteenth Amendment.

[51] *Evans* v. *Cornman, supra,* 398 U.S. at 422; *Kramer* v. *Union School District,* 395 U.S. at 625; *Dreuding* v. *Devlin,* 380 U.S. 125, affirming 234 F. Supp. 721 (D. Md.); *Carrington* v. *Rash,* 380 U.S. 89, 91; *Lassister* v. *Northampton County Board of Elections,* 360 U.S. 45, 51; *Pope* v. *Williams,* 193 U.S. 621, 633; *McPherson* v. *Blacker,* 146 U.S. 1, 35.

[52] The question was presented last Term, but not decided, in *Hall* v. *Beals,* 396 U.S. 45. See *infra* p. 61 n. 61. We understand

The debates established that the state law classifications of voters according to duration of residence which are affected by Section 202 operate to prevent a large class of citizens from voting in presidential elections who otherwise would be able to do so. *Supra*, p. 8, n. 9. The class is thus excluded from a significant aspect of the franchise, for the general principle as to the importance of the right to vote (see, *e.g.*, *Kramer* v. *Union School District, supra*) certainly applies with respect to selection of the President and Vice President.[53] *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 545; *Williams* v. *Rhodes, supra*, 393 U.S. at 31. As to that aspect, Congress found that:

> * * * the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President * * * does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections. [Section 202(a)(6).]

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that an equal protection challenge to all lengthy residence requirements may be brought before this Court on appeal in *Bury* v. *Canniffe*, Civ. No. 69–855–C, D. Mass., decided July 8, 1970; see also *Blumstein* v. *Ellington*, Civ. No. 5815, M.D. Tenn., decided August 31, 1970.

[53] Application of the Equal Protection Clause to voting in presidential elections is not affected by the fact that a state might provide for appointment, rather than election, of presidential electors. Once it is decided to rely upon popular election, the state must, as with regard to any election, comply with the Fourteenth Amendment in determining eligibility to vote. *Williams* v. *Rhodes, supra*. Cf. *Kramer* v. *Union School District, supra*, 395 U.S. at 628.

The validity of this finding can be demonstrated by appraising the various justifications offered for the durational residency requirements.[54]

The general basis for such limits on the franchise is to insure that the voter has sufficient roots in the community to give him familiarity with local conditions, candidates and issues. While this objective may be valid with respect to congressional, state and local elections, it is inapplicable to presidential elections. The President is selected by and is responsible to the entire nation. Since the issues and personalities involved in presidential elections are of nationwide significance, the new resident of a jurisdiction is just as familiar with the candidates for President and their platforms as is the resident of long standing.[55]

Related to the objective of insuring knowledge of local conditions—and equally invalid—is the notion that a presidential election may involve certain parochial interests of the state or city and that a long period of residence is warranted to impress local view-

[54] It is important to distinguish between the basic requirement that the person be a *bona fide* resident of the jurisdiction and the separate qualification as to length of residency. Section 202 deals with the latter and in general does not affect the former.

[55] See, *e.g.*, 115 Cong. Rec. 12156 (daily ed., December 11, 1969) (Rep. Rhodes); 116 Cong. Rec. 2758 (daily ed., March 2, 1970) (ten Senate Judiciary Committee members); 116 Cong. Rec. 3003 (daily ed., March 4, 1970) (Sen. Baker). See also Commissioners' Prefatory Note to Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A. p. 201 (1967 Supp.); and Schmidhauser, *op. cit.*, *supra*, p. 828.

points upon voters. Responding to this asserted rationale, Congress expressly found that the imposition of the durational residency requirement as a precondition to voting for President and Vice President "in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote." Section 202(a)(4). "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington* v. *Rash, supra,* 380 U.S. at 94. See also *Evans* v. *Cornman, supra.*

The other broad heading of asserted justification for lengthy state residence requirements is administrative convenience: the need for adequate time in which to investigate prospective voters, to prevent fraud, and to do necessary paperwork; and the convenience of applying the same standards in presidential elections as in other elections which may be conducted simultaneously by the state and which *are* subject to its residence standards. Where fundamental rights are concerned, of course, overbreadth of classification can not be justified by mere administrative convenience. *Carrington* v. *Rash, supra,* 380 U.S. at 96; *Harman* v. *Forssenius,* 380 U.S. 528, 542-543; *Shapiro* v. *Thompson,* 394 U.S. 618, 637. But beyond that, Congress carefully investigated the matter and determined in each instance that, as applied to a residence period of more than thirty days, the administrative convenience arguments are without force.

Thus, Congress' examination made it quite clear that investigation of new voters, paperwork, and the prevention of fraud require no more than thirty days. Four-fifths of the states permit registration or qualification for the vote by at least some classes of citizens up to the thirtieth day prior to a presidential election.[44] As Section 202's sponsor, Senator Goldwater, stated (Voting Rights Hearings, p. 282):

> When these requirements are applied in a reasonable way, they can serve a valid purpose by protecting against fraudulent voting and allowing the election officials to carry out the paperwork and mechanics of holding an election.
>
> But whatever the reasons for permitting a State to set a closeout date for registering to vote for President, there is no compelling reason for imposing a separate and additional requirement that voters also must have been residents of the State for a particular length of time. If a State can satisfy its logistical needs by keeping its voting lists open up to 30 days before an election—as 40 States now do—what is the justification for barring citizens from balloting for President unless they have been residents of the State for 6 months or 1 year?
>
> So long as a citizen is a good-faith resident of a State and the State has adequate time to check on his qualifications, the duration of his residency should have no bearing on his right to participate in the election of the President.

If so many states are able to accommodate their legitimate logistical needs in thirty days or less, Congress

[44] See 116 Cong. Rec. 3543 (daily ed., March 11, 1970).

was correct in concluding that the "administrative convenience" of a longer period is insubstantial, and is not in fact its real rationale.

The prevention of double voting and other fraudulent practices, moreover, can readily be accomplished by measures which do not result in the wholesale disfranchisement of voters, very few of whom would ever consider such practices. The federal statute itself prescribes criminal penalties for false registration and other fraudulent acts relating to the residency provisions. Section 202(i). Many states have similar prohibitions against improper voting practices, and other means of protecting the integrity of the registration and electoral process are available.[57] Since fundamental rights are in the balance, compare *Shapiro* v. *Thompson, supra,* 394 N.S. at 637, Congress was warranted in limiting the states to the use of these less drastic means of accomplishing their purposes. See also *Kramer, supra,* 395 U.S. at 632–633; *Cipriano* v. *City of Houma,* 395 U.S. 701, 706–707.

[57] For example, the Uniform Voting by New Residents in Presidential Elections Act, 9C U.L.A. pp. 198–207 (1967 Supp.), contains a number of administrative safeguards, including (1) requiring a sworn statement describing past and present residences and an express denial that the individual will vote elsewhere in the particular election, § 2; (2) prescribing criminal penalties for providing false information, § 10; (3) informing the state where the individual formerly resided of his application for a presidential ballot, § 3; (4) maintaining a file and index of such information received from other states regarding former residents of the particular state, § 4; (5) maintaining and making available for public inspection lists of the applications of new residents for presidential ballots, § 7, and (6) permitting the vote of new residents to be challenged for cause, § 9.

Of course, where necessary, election officials can communicate with their counterparts in other states or counties by tele-

Nor is it compelling that a state may have to adopt a wholly separate registration qualification procedure for presidential elections if it wishes to retain its longer residency period for its other elections. Three-fifths of the states have created a special method for voting in presidential elections in the case of new residents who cannot meet the usual residence requirements, permitting these citizens to vote for presidential electors but not for other purposes. 116 Cong. Rec. 3539 (daily ed., March 11, 1970). But beyond that lesson of experience, the fact that it may be somewhat more expensive to recognize fundamental rights than to ignore them has never been given substantial weight in the balance. *Shapiro, supra,* 394 U.S. at 633; *Gideon* v. *Wainwright,* 372 U.S. 335, 344; *Griffin* v. *Illinois,* 351 U.S. 12.

Finally, no compelling interests mark the other side of the ledger, where states are compelled to permit voting, absentee or in person, by former residents who for reasons of time have not been able to register in their new state of residence. By the terms of Section 202(e), the former resident must be qualified (except as to his residence at the time of the election) as a voter of the state he has departed. As above, the state has no cognizable *political* interests in preventing his vote for President and Vice President; as to these voters, who will almost always have been registered to vote for some time in the state they have left, the arguments of administrative convenience are wholly

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phone, as well as by mail. Presumably, where it is available for use by election officials, data processing equipment can also facilitate implementation of Section 202. See Note, 45 Notre Dame Law. 150 (1969).

unpersuasive. As the experience of ten states has shown (116 Cong. Rec. 3543 (daily ed., March 11, 1970); compare *id.* at 3542, Table 2), the reform is easily accomplished.

In sum, Congress intended to give, and did give, fully adequate weight to the needs and interests of state election officials. "[E]very standard set forth in the amendment has been modeled after practices that are used by the States themselves and are proven to be workable." 116 Cong. Rec. 3539 (daily ed., March 11, 1970; Sen. Goldwater). In acting *by statute*[58] to prevent denials of the vote which it properly determined to be unjustified, Congress fully honored the bounds of its Fourteenth Amendment enforcement power.

2. Absentee voting and registration

The validity of the absentee voting and registration provisions is demonstrated by a quite similar analysis. The basic problem which Congress identified was abridgement of the right to vote in presidential

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[58] Idaho may contend that this case is controlled by *Dreuding* v. *Devlin*, 380 U.S. 125, summarily affirming 234 F. Supp. 721 (D. Md.), a district court decision which upheld against constitutional attack Maryland's one-year residency requirement as applied to presidential elections. Passing the question whether *Dreuding* would be decided the same way today (see *Hall* v. *Beals*, *supra*, 396 U.S. at 52 (dissent)), in that case, as in *Lassiter* and all the other cases upholding state voter qualification provisions against constitutional attack on the ground of state prerogative, there was no congressional legislation on the point. Where such legislation has been enacted, relieving the judiciary of any need itself to set standards of a legislative nature, compare pp. 36–39 *supra*, congressional power to act has been upheld. *Katzenbach* v. *Morgan*, *supra*; *South Carolina* v. *Katzenbach*, *supra*.

elections because of the "lack of sufficient opportunities for absentee registration and absentee balloting in * * * [such] elections." Section 202(a). Congress believed that many states impose undue limits upon the availability and use of absentee ballots; only 20 states permit civilians generally to register absentee.[59] Congress expressly found that these restrictions upon the franchise were not justified by any "compelling State interest in the conduct of presidential elections." Section 202(a)(6). In some states, the provisions of Section 202 designed to benefit persons absent from their election district will cause additional tasks for those responsible for administering registration and election laws. However, as is true with respect to the matter of durational residence requirements, the possible interest of a state in avoiding such administrative tasks is not the type of interest which warrants denial of the right to vote. *Carrington* v. *Rash, supra.*

That Congress had a proper basis for "[resolving] the conflict as it did" (*Katzenbach* v. *Morgan, supra,* 384 U.S. at 653) is demonstrated by the following statement of Senator Goldwater [116 Cong. Rec. 3539 (daily ed., March 11, 1970)]:

> * * * [M]y amendment [Section 202] will permit all categories of citizens, both civilian and military, to register absentee and to vote by absentee ballot.
>
> Specifically, the amendment provides that citizens may apply for absentee ballots for President and Vice President up to 7 days before the election and may return their

[59] See 116 Cong. Rec. 3543–3544 (daily ed., March 11, 1970).

marked ballots as late as the close of the polls on election day. Once again, the features of my measure are drawn from the proven practice of the States themselves. At present 37 States allow certain voters to make application for absentee ballots up to a week before the election and 40 States provide that the marked ballots need not be returned until election day itself.

* * * * *

My amendment will also allow citizens who are away from their homes to register absentee. Forty-nine States now permit servicemen to register absentee or do not even require them to register at all * * *.

* * * * *

* * * [I]t seems entirely appropriate to ask that the same rule shall be applied on behalf of civilian citizens who are temporarily living away from their regular homes, whether they are visiting relatives or friends abroad, attending college outside their own State, working for a U.S. firm overseas, or serving as Federal employees away from their normal homes.[60]

See also 116 Cong. Rec. 3543–3544 (daily ed., March 11, 1970).

[60] We do not believe it could properly be argued that a state has any legitimate political basis for distinguishing between civilian and military citizens for the purpose of permitting absentee registration only by the latter. Considerations of the "worthiness" of the reason for a person's inability to register could not warrant the penalty of denying registration. And the administrative difficulties of registering and dealing by mail with military personnel, many of whom at present are in remote areas of the world, is evidently no less than that of dealing with civilians on a business trip or away from home at school.

In conclusion, in light of (1) the interests of citizens disfranchised by durational requirements and by inadequate provisions for absentee voting and registration and (2) lack of any sufficient countervailing state interest, Congress determined that the state laws affected by Section 202 embody classifications which are inconsistent with the guarantees of the Fourteenth Amendment. That determination, we submit, was fully warranted, and the remedies adopted by Congress are appropriate ones. At the very least, the Court can "perceive a basis" for the federal legislation. Cf. *Katzenbach* v. *Morgan, supra.* It follows that Section 202 is a valid exercise of congressional authority.

B. OTHER CONSTITUTIONAL BASES FOR SECTION 202.

While the Fourteenth Amendment analysis above is the principal, and we believe adequate, support for Section 202, other considerations can also be adduced.[61] First, the selection of the President and Vice President is, perforce, an especially *federal* event, and it may therefore be argued that Congress has special powers to govern it. While the states are not obligated by the written instrument of the Constitution to make that process elective, all have done so. That choice having been made, the right to participate in such elections becomes "a privilege of *national* citizenship derived from the Constitution." *United States* v. *Original Knights of the Klu Klux Klan,* 250 F. Supp.

[61] These arguments were set out at greater length in the Brief *Amicus Curiae* filed by the United States last Term in *Hall* v. *Beals,* No. 39, O.T., 1969, pp. 12–18. In view of the recency of that filing, we merely summarize them here.

330, 353 (E.D.La.; emphasis added); *Twining* v. *New Jersey*, 211 U.S. 78, 97; *United States* v. *Classic*, *supra*; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461; see *Williams* v. *Rhodes*, 393 U.S. 23. It has long been established that Congress may enact laws ensuring the proper conduct of those elections. See *Ex Parte Yarbrough*, 110 U.S. 651; *Burroughs and Cannon* v. *United States*, 290 U.S. 534.[*]

Second, the questions of residence and absentee voting each have an evident relationship to the right to travel freely among the several states, which has consistently been identified by this Court as "fundamental." *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 638; *United States* v. *Guest*, 383 U.S. 745, 757–758; *Edwards* v. *California*, 314 U.S. 160; *Twining* v. *New Jersey*, *supra*; *Williams* v. *Fears*, 179 U.S. 270, 274; *Crandall* v. *Nevada*, 6 Wall. 35; *Passenger Cases*, 7 How. 283, 492. While residency requirements are not intended as a penalty on that right, they have that effect—in a very large number of cases, as was shown in the debates. Under the cited cases, it is therefore clear that a "compelling" state interest in exclusion from the vote must be shown, whether or not the right to vote is also considered "fundamental." In presidential elections, for the reasons shown above, states have no such interest.

[*] The Constitution does not link the voting qualifications for participating in a presidential election to state voting qualifications generally. Such a link *is* made for congressional elections (Article I, Section 2; Seventeenth Amendment), suggesting another basis for argument that Congress has relatively broad power over the conduct of presidential elections.

IV. TITLE III, IN PROHIBITING THE STATES FROM DENYING THE VOTE TO OTHERWISE QUALIFIED CITIZENS EIGHTEEN YEARS OF AGE AND OLDER BECAUSE OF AGE, IS A PROPER EXERCISE OF CONGRESS' POWER UNDER THE FOURTEENTH AMENDMENT TO REMOVE UNWARRANTED RESTRICTIONS ON THE RIGHT TO VOTE

Section 302 of the 1970 Amendments provides that:

> * * * no citizen * * * who is otherwise qualified to vote in any State or political subdivision in a primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

While this provision has been the subject of more public controversy than the others at issue in these cases and is the only one which rests solely on Congress' power to enforce the Equal Protection Clause, the issues here are the same so far as that power is concerned: the scope of that power, and the standard of rationality which state exclusions from the franchise must satisfy under the Equal Protection Clause. That is, in each provision, Congress has confronted a state exclusion from the franchise which it concluded after careful examination vindicated no important state interest; in each, it has restricted state power to deny the franchise on the examined ground, to the extent it found such denial to be unwarranted.

There is no basis for applying one standard to judge the exclusion from voting of citizens between the ages of 18 and 21 while at the same time applying

another standard to judge the exclusion of a different group.[43] All are "locked into [a] self-perpetuating status of exclusion from the electoral process." *Kramer, supra,* 395 U.S. at 640 (Stewart, Black and Harlan, JJ., dissenting). The exclusion of 18–20 year-olds "from any voice in the decisions" of legislators and from any "voice in selecting" legislators, 395 U.S. at 628, is no less complete than that felt by any other disfranchised group. The legal analysis, in each case, is then the same.[44]

The framework of that analysis is set out at length in Part I of this argument *supra,* pp. 23–39. In summary, we believe it settled that the general prerogative of states to fix voter qualifications in state, local, and national elections is subject to the strictures of the Equal Protection Clause. As applied to classifications which have the effect of excluding some persons from the vote while granting the vote to others, that clause

[43] On those occasions when this Court has mentioned the age qualification, it has in the same breath linked this qualification with others, such as residency. *E.g., Kramer* v. *Union School District, supra,* 395 U.S. at 626; *Lassiter* v. *Northampton County Board of Elections, supra,* 360 U.S. at 51; and see generally cases cited at n. 51 *supra.*

[44] Professor Archibald Cox made the point in these terms: "* * * [T]he constitutional underpinning for abolishing residency requirements and literacy tests is equally applicable to legislation reducing the voting age to eighteen. * * * Under the Fourteenth Amendment the question is whether the classification is reasonable or arbitrary and capricious * * *. Under Section 5 of the Fourteenth Amendment * * * the Congress has the power to make its own determination." Voting Rights Hearings, pp. 704-705; Voting Age Hearings, p. 177. See also 116 Cong. Rec. 3063 (daily ed., March 5, 1970); Voting Age Hearings, p. 169 (Sen. Kennedy); n. 19 *supra.*

requires that there be a "compelling state interest" to support the exclusion made. The responsibility to effectuate adherence to this standard lies with Congress as well as the courts. Indeed, Section 5 of the Fourteenth Amendment gives Congress particularly broad powers, both to identify violations of the standard and to remedy them. *Katzenbach* v. *Morgan, supra.* Where Congress on its own initiative investigates state voter qualifications and concludes that they deny equal protection to a class of otherwise qualified voters, the enforcement clause authorizes legislation to remove the disqualification and thus cure the defect; such legislation will be upheld if this Court can "perceive a basis" for it.

Here, Congress has found that the exclusion of 18–20 year-olds from the ballot denies them the vote in the absence of any "compelling state interest" to do so. Although it may be conceded that the states have an important interest in protecting their elections from irresponsible voting, Congress determined that the particular application of that principle to this age group did not support their exclusion. To a much greater extent than *Katzenbach* v. *Morgan, supra,* it did so on the basis of a voluminous legislative history, reflecting full congressional analysis of the factors relevant to the constitutional question, careful evaluation of the conflicting interests, and virtual unanimity on the underlying issue of the readiness of this age group for the vote. See 116 Cong. Rec. 3501, 3517 (daily ed., March 11, 1970; Sens. Mansfield and Randolph). Particularly since the subject of voter qualifications involves an area in which elected representatives have a special

informed competence, that determination is entitled to deference. We now turn to examine the bases on which it was made.

1. *Historic origins.* Congress discovered that the use of 21 as the age of majority is something of an "historical accident," *Williams* v. *Florida,* 399 U.S. 78, 89, which today has no necessary relation to the qualities which warrant age restrictions—maturity and responsibility in exercising the franchise. A frequently mentioned explanation was that in medieval times "a young man was deemed to have become capable at that age of bearing the heavy armor of a knight." 116 Cong. Rec. 3503 (daily ed., March 11, 1970). While one readily understands how that age might have become associated with participation in governmental affairs and majority generally, the basis is no more than tradition. As this Court has remarked, "[r]epresentation schemes once fair and equitable become archaic and outdated." *Reynolds* v. *Sims, supra,* 377 U.S. at 567; See also *Levy* v. *Louisiana,* 391 U.S. 68, 71; *Missouri* v. *Holland,* 252 U.S. 416, 433.

2. *Military service.* Congress found that to deny citizens between the ages of 18 and 21 the right to participate in the election of those who shape this nation's affairs is "particularly unfair * * * in view of the national defense responsibilities imposed upon such citizens." Section 301(a)(1). The burden of participation in government affairs, through military service, today falls heavily on the young men of this

age group.[65] With the recent change to a system of random selection in administering the draft.[66] they can expect to bear virtually the entire burden of compulsory service.[67] Statistically, "[a]bout 30% of our forces in Vietnam are under 21.[68] Over 19,000 or almost half of those who have died in action there, were under 21." 116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy). As one of the co-sponsors of the Senate bill remarked, the imposition of this burden makes access to the franchise particularly important:

> The well-known proposition—"old enough to fight, old enough to vote"—deserves special mention. To me, this part of the argument for granting the vote to 18 year-olds has great appeal. At the very least, the opportunity to vote should be granted as a benefit in return for the risks an 18 year-old is obliged to assume when he is sent off to fight for this country. * * *
>
> To be sure, as many critics have pointed out, the abilities required for good soldiers are not

[65] With limited exceptions all males in the United States must register for the daft upon attaining age 18 (50 U.S.C. App. 453); men between 18½ and 26 are liable for training and service in the Armed Forces (50 U.S.C. App. (Supp. IV) 454). Enlistment without parental consent is permitted in the Army, Air Force, Navy and Marine Corps at age 18 for males and 21 for females. 10 U.S.C. 3256(a), 8256(a) and 5533(a) and (b); but see 14 U.S.C. 368.

[66] See Presidential Proclamation No. 3945, 34 Fed. Reg. 19017. See also remarks of Representative Robison, 116 Cong. Rec. 5673 (daily ed., June 17, 1970): "our recent actions and those of the President place more of the burden of carrying on our wars on the younger men of our country."

[67] During the first half of 1970, 55.4 percent of the inductees were 20 and 2.6 percent 19.

[68] The comparable figure for the Armed Forces as a whole is 26.4 percent.

the same abilities required for good voters. Nevertheless, I believe that we can accept the logic of the argument without making it dispositive. A society that imposes the extraordinary burden of war and death on its youth should also grant the benefit of full citizenship and representation, especially in sensitive and basic areas like the right to vote. [116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy).]

3. *Participation in the work force and civic responsibility.* Persons older than 18, as a class, engage in other activities which, Congress found, give them important interests in the vote. According to the Department of Labor, 66.8 percent of the men and 49.3 percent of the women aged 18 and 19 were in the labor force as of May, 1970.[69] While separate figures are not available for 20-year olds,[70] it stands to reason that a corresponding large percentage of that group also hold jobs. The salaries they earn account for substantial amounts of taxes paid to the federal and

[69] See Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Vol. 16, No. 12 (June 1970), table A–3. The term "labor force" includes both civilian and military employment, it also includes full-time and part-time employees and persons who are in the labor force though currently unemployed. For both males and females, aged 18 and 19, the unemployment rate was approximately 10.6 percent. Of the males in this age group *not* in the labor force, the vast majority were enrolled in school. Of the females, aged 18–19, not in the labor force, almost all were either in school or "keeping house."

The percentages of 16-and 17-year olds in the labor force (*i.e.*, 44.1 percent of the males; 30.4 percent of the females) were substantially lower than those for the 18-to 19-year olds.

[70] The pertinent tables include 20-year olds in a 20-to-24 age category.

state governments;[71] however, in most states, as Senator Mansfield pointed out, these citizens "have no voice in the imposition of those taxes." 116 Cong. Rec. 2939 (daily ed., March 4, 1970).

Of course, the group is subject to the laws of the state and nation. The criminal laws, which control their behavior, generally treat them as adults. 116 Cong. Rec. 3518 (daily ed., March 11, 1970; Sen. Randolph); See Voting Age Hearings, pp. 5–8. And their broad participation in adult affairs generally gives them a pervasive and personal interest—no longer necessarily or adequately represented by their parents—in how laws are framed and executed. In sum, it cannot be said that persons older than 18, but not yet 21, are "substantially less interested" than their elders in the many electoral decisions affecting laws on crime, taxes, unemployment, foreign policy, and military service, to mention but a few examples. See *Evans* v. *Cornman,* 398 U.S. 423–425.

4. *Readiness for the vote.* Congress' findings were not restricted to the proposition that the vote is important or a matter of substantial interest to persons over eighteen; it also learned that those persons, as a class, are ready for responsible voting.

In one respect, this readiness is reflected in the class' educational achievements. While in "1900 only 6% of Americans who had reached 18 were high

[71] Unpublished data of the Office of Research and Statistics of the Social Security Administration indicates that persons between the ages of 18 and 20 had income (subject to Social Security tax) of approximately 15 billion dollars in 1967 (the latest year for which such calculations have been made).

school graduates," today 81 percent of them are in this category."[72] 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater); Voting Age Hearings, p. 133. Of the current graduates, "[a]lmost 50% * * * are enrolled in college [and] the education which they are receiving is more advanced and intense than at any time in our history." *Ibid.* Complementing this is the obvious fact that we are now living in "the age of instant communications, all-news radio stations, [and] T.V. news." *Ibid.* On this evidence, Congress unquestionably was correct in its judgment that "youth today is better informed and better equipped than any previous generation." *Ibid.*

It is not only a matter of education, however. Congress heard expert testimony that young people reach physical and mental maturity several years earlier today than they did a century ago.[73] The large number of persons who join the work force (*supra* p. 68), or marry before they reach twenty-one, 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater), is further indication of their adult status. See Voting Age Hearings, p. 5. There was ample basis for the conclusion that the denial of the franchise

[72] A report of the Bureau of the Census entitled *Educational Attainment* (March 1968) showed that the median number of school years completed was 12.2 for persons aged 18 and 19, but only 8.8 for persons aged 65 to 74. Current Population Reports, Series P–20, No. 182 (1969), table 1. See 116 Cong. Rec. 5675 (daily ed., June 17, 1970). As late as 1940, only one-half of all 18-year-olds had completed high schools. 116 Cong. Rec. 3216 (daily ed., March 19, 1970; Sen. Goldwater); Voting Age Hearings, p. 133.

[73] Senator Bayh, referring to testimony of Dr. Margaret Mead (Voting Age Hearings, pp. 223–233), stated: "Dr. Mead told

was not warranted by any concern that it would not be responsibly used:[74]

> It is plain—indeed, conspicuous—that today's 18-year olds are far better educated and far more sophisticated than those of even a generation ago. It can be argued convincingly, in fact, that contemporary youth is more keenly aware of the problems confronting American society and more ardently committed to solving those problems than many of their elders. At the age of 18, young men and women have completed their secondary education. They are entering college, joining the Armed Forces, taking jobs. They are more intellectually mature and more politically responsible than any generation in the country's history. It was nearly two centuries ago—in a small, rural, agrarian society—that most States set the voting age at 21. It made sense then. It no longer makes sense today. [116 Cong. Rec. 5654 (daily ed., June 17, 1970; Rep. Boland)]

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us that in the last hundred years, the age of maturing young people has lessened by 3 years. So we can say reasonably, scientifically, and medically that a young person today is as mature at 18 as a young person 100 years ago was at age 21." 116 Cong. Rec. 3510 (daily ed., March 11, 1970); Voting Rights Hearings, pp. 323 and 116 Cong. Rec. 3057, (daily ed., March 5, 1970; Sen. Kennedy); 116 Cong. Rec. 3216 (daily ed., March 9, 1970; Sen. Goldwater).

[74] Virtually the same arguments advanced today against lowering the voting age were also made "against the enfranchisement of women 50 years ago, the enfranchisement of freed slaves 100 years ago, and the enfranchisement of men who didn't own property 150 years ago," Chapman, *The Right to Vote at 18*, Voting Age Hearings, pp. 425, 427. See also Voting Rights Hearings, p. 323; 116 Cong. Rec. 3058 (daily ed., March 5, 1970; Sen. Kennedy).

5. *Practical experience.* Congress' determination was not merely the result of abstract analysis. It also considered the experience of the four states—Georgia since 1943, Kentucky since 1955 and Alaska and Hawaii since they entered the Union in 1959—which presently grant the franchise to persons under 21.[75] On investigation, Congress discerned "no evidence that the reduced voting age has caused any difficulty whatever in [these] states."[76] Indeed, two "former governors * * * of Georgia * * * [had] testified in the past that giving the franchise to 18-year-olds in their [state had] been a highly successful experiment." Voting Age Hearings, pp. 162–163; Voting Rights Hearings, p. 324. Moreover, as Representative Burlison pointed out (116 Cong. Rec. 5668 (daily ed., June 17, 1970)):

> In 1960, a study was undertaken at the University of Kentucky to study student voting habits. The test showed that in Kentucky where 18-year-olds can vote, 80 percent did so. Contrast this with the statewide figures which indicate that only 59 percent of the general public voted in the same election. * * *

Taken as a whole, these findings amply support Congress' conclusion that the denial of the vote on account of age to persons 18 years of age and older is not warranted by any "compelling State interest," and constitutes a denial of equal protection which Congress

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[75] Congress also took note of the fact that a significant number of foreign nations, including, recently, Great Britain, now permit 18-year-olds to vote. Voting Age Hearings, p. 163; 116 Cong. Rec. 3058 (daily ed., March 5, 1970). A study of the issue in Great Britain led to conclusions identical to those reached by the Congress. Report of the Committee on the Age of Majority, H.M.S.O. Cmnd. 3342 (1967), pp. 39–40.

[76] See, *e.g.*, 116 Cong. Rec. 3475 (daily ed., March 11, 1970); *id.* at 3493 (daily ed., March 11, 1970).

may remedy under Section 5 of the Fourteenth Amendment. While the states have an interest in assuring responsible and honest use of the ballot, the material Congress considered reflects both the importance of the vote to the affected class, and the absence, today, of any sufficient basis on which to differentiate the class [77] of 18–20-year olds from those 21 and above on grounds of their likely responsibility or political awareness. Of course there may be marginal differences. Cf. *Katzenbach* v. *Morgan, supra* (Spanish compared to English literacy); *Evans* v. *Cornman, supra* (full state residence compared to residence in federal enclave). But it was for Congress to find, and on this record it rationally did find, that those differences were so slight as not to justify exclusion of this class from the franchise.[78] *Katzenbach* v. *McClung,* 379 U.S. 294, 303–304; *Katzenbach* v. *Morgan, supra,* 384 U.S. at 648–651.

There remains the contention that the 18-year old provision is invalid because the Constitution in several places recognize state power to fix voting standards, and, therefore, limitations on that power must also be set by the Constitution. But the Equal Protec-

[77] The class as a whole is surely not to be penalized because a very small percentage of its members have engaged in riotous demonstrations. Voting Age Hearings, p. 16. Individuals, if convicted of crime, remain subject to individual loss of the franchise for that reason.

[78] There is, of course, no basis for complaint in the fact that Congress set the figure at 18, rather than some lower figure which, if it had considered the matter, it might conceivably have found proper. See 116 Cong. Rec. 3063 (daily ed., March 5, 1970; Prof. Cox). It is inherently the legislative function to draw lines at the point most clearly warranted by the findings made. See p. 37 and n. 27 *supra.*

tion Clause, under which Congress acted here, is one of the restraints which the Constitution imposes on the states. Thus, the contention that there is no constitutional limitation here is a variant of the argument that the Equal Protection Clause cannot apply to matters of voting qualification, else the Fifteenth Amendment would be rendered nugatory and Section 2 of the Fourteenth Amendment, an anachronism. While that argument was briefed in *Katzenbach* v. *Morgan, supra,* (Brief for Appellees, No. 847, O.T. 1965, p. 8 and Appendix), the Court there unanimously agreed that the Equal Protection Clause does apply to voting matters. It apparently found the argument so insubstantial as not to warrant mention. Since Congress legislated here to enforce the Equal Protection Clause, the requirement that there be a constitutional basis for restricting state power over voting matters has been met and the only issue is as framed above—whether the age provision, like the residence and literacy provisions of the 1970 Act—is a proper exercise of the power Congress has been given to enforce that constitutional provision.

Similarly, it cannot be said that Section 2 of the Fourteenth Amendment establishes 21 as the only appropriate age for equal protection purposes, any more than it establishes that literacy or durational-residency requirements are inappropriate.[79] That section was intended to set a wholly internal, administrative remedy for a different type of discriminatory denial of

[79] The section refers to a denial of the right to vote "to any of the male *inhabitants* of such State, being twenty-one years of age, and citizens of the United States," (emphasis added), making no reference to literacy or duration of residence.

the right to vote—that is, it was designed to assure the franchise to emancipated slaves who met the then existing voting qualifications.[80] "[M]ale inhabitants * * * twenty-one years of age, and citizens of the United States" is no more than descriptive of voting laws as they then stood, and cannot be read as fixing constitutional standards, one way or the other. As has amply been shown, conditions have changed, and Congress properly so found.

Finally, there is no substance to the contention that exclusion of persons younger than 21 by the states must be permitted because in some states proposals to lower the voting age have been defeated by referendum. First, as this Court has repeatedly said, the need for careful scrutiny of exclusions from the franchise arises precisely because those exclusions tend to be self-perpetuating. *E.g., Kramer* v. *Union School District, supra,* 395 U.S. at 628; see *supra,* pp. 30–34. In any event, the existence or absence of a sufficient state interest in the exclusion is not to be measured by voter disinterest. "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 736–737; see also *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638.

Accordingly, Title III is fully warranted as legislation which enforces the provisions of the Fourteenth Amendment. Even if this Court might not fully agree with the informed judgment of Congress, "the legislators, in light of the facts and testimony before them,

[80] This section has never been enforced. See, *e.g., Dennis* v. *United States,* 171 F. 2d 986, 993 (C.A.D.C.).

[had] a rational basis for finding" that the steps they took were necessary to enforcement of the Equal Protection Clause. *Katzenbach* v. *McClung, supra,* 379 U.S. at 303–304. Certainly, the Court can readily "perceive a basis" for Congress' considered conclusion that nullification of those classifications which exclude otherwise qualified persons over the age of 18 from the vote on account of age was necessary to that end. In that circumstance, the government is entitled to have Title III enforced.

CONCLUSION

For the reasons given, the United States should be granted the relief requested in its complaint.

Respectfully submitted.

JOHN N. MITCHELL,
Attorney General.
ERWIN N. GRISWOLD,
Solicitor General.
JERRIS LEONARD,
Assistant Attorney General.
PETER L. STRAUSS,
SAMUEL HUNTINGTON,
WM. BRADFORD REYNOLDS,
Assistants to the Solicitor General.
DAVID B. MARBLESTONE,
JEREMY I. SCHWARTZ,
Attorneys.

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APPENDIX A

VOTING RIGHTS ACT AMENDMENTS OF 1970, P.L. 91–285, 84 STAT. 314

AN ACT To extend the Voting Rights Act of 1965 with respect to the discriminatory use of tests, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That this Act may be cited as the "Voting Rights Act Amendments of 1970".

SEC. 2. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by inserting therein, immediately after the first section thereof, the following title caption:

"TITLE I—VOTING RIGHTS".

SEC. 3. Section 4(a) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by striking out the words "five years" wherever they appear in the first and third paragraphs thereof, and inserting in lieu thereof the words "ten years".

SEC. 4. Section 4(b) of the Voting Rights Act of 1965 (79 Stat. 438; 42 U.S.C. 1973b) is amended by adding at the end of the first paragraph thereof the following new sentence: "On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) pursuant to the previous sentence, the provisions of subsection (a) shall apply in any State or any political subdivision of a State which (i) the Attorney Gen-

eral determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."

SEC. 5. Section 5 of the Voting Rights Act of 1965 (79 Stat. 439; 42 U.S.C. 1973c) is amended by (1) inserting after "section 4(a)" the following: "based upon determinations made under the first sentence of section 4(b)", and (2) inserting after "1964," the following: "or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968,".

SEC. 6. The Voting Rights Act of 1965 (79 Stat. 437; 42 U.S.C. 1973 et seq.) is amended by adding at the end thereof the following new titles:

"TITLE II—SUPPLEMENTAL PROVISIONS

"APPLICATION OF PROHIBITION TO OTHER STATES

"SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4(a) of this Act are not in effect by reason of determinations made under section 4(b) of this Act.

"(b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

"RESIDENCE REQUIREMENTS FOR VOTING

"SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

"(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

"(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for

registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President

and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

"JUDICIAL RELIEF

"SEC. 203. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2282 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

"PENALTY

"SEC. 204. Whoever shall deprive or attempt to deprive any person of any right secured by section 201 or 202 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"SEPARABILITY

"SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

"SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"ENFORCEMENT

"SEC. 303. (a)(1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

"(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

"(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"DEFINITION

"SEC. 304. As used in this title the term 'State' includes the District of Columbia.

"EFFECTIVE DATE

"SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971."

Approved June 22, 1970.

APPENDIX B

Article 7, Section 2 of the Arizona Constitution provides: No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word 'citizen' shall include persons of the male and female sex.

The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Sections 16–101 and 16–107 of the Arizona Revised Statutes provide as follows:

§ 16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.

2. Will be twenty-one years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an election held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

§ 16-107. Closing of registrations

A. No elector shall be registered to vote in a primary election between five o'clock p.m. of the day which is four months preceding the date of the next general election and six o'clock p.m. of the day of the primary election.

B. No elector shall be registered between five o'clock p.m. of the seventh Monday preceding a general election and six o'clock p.m. of the day thereof. As amended Laws 1958, Ch. 48, § 1.

APPENDIX C

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Sections 34-401, 34-408, 34-409, 34-1101 and 34-1105 provide in pertinent part:

34-401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days,

where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34-408. Eligibility of new residents to vote.—Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state (except the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34-409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34-413. Voting by new residents.—(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county

auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34–1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 46, Original

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UNITED STATES, Plaintiff,

vs.

STATE OF ARIZONA, Defendant

- - - - - - -

Motion to Intervene by Frederick J. Christopher, Jr., Benton Cole, Salvatore Lo Dico, George C. Smith, and Raymond J. Meredith, as Defendants

- - - - - - -

ALFRED AVINS
Attorney for proposed intervening defendants
Suite 73
605 West 113th St.
New York City, N.Y. 10025

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1970
No. 46, Original

UNITED STATES, Plaintiff,
vs.
STATE OF ARIZONA, Defendant

- - - - - - - - - -

Motion for Leave to Intervene by Frederick J. Christopher, Jr., Benton Cole, Salvatore Lo Dico, George C. Smith and Raymond J. Meredith, as defendants.

* * * * * * * * * *

Frederick J. Christopher, Jr. is a candidate for the New York State Senate from a part of New York County (Manhattan), New York City, New York, on the Conservative Party ticket, for the general election on November 3, 1970. Salvatore Lo Dico is a candidate for U.S. House of Representatives on the Conservative Party ticket from the 19th Congressional District of New York State, a part of New York County. They, along with Benton Cole, are voters and officials of the New York County Conservative Party. George C. Smith and Raymond J. Meredith are voters in Queens County, New York City. They move to intervene in this action seeking to establish the constitutionality of the literacy test ban in the Voting Rights Act Amendments of 1970. Reference is herewith made to the motion and brief of the New York City Board of Elections filed in the above case with the request to intervene in Nos. 43 and 44, showing that the new federal law suspends the New York State literacy test for voting.

The practical difference in campaigning for public office between the New York metropolitan area and a small, still semi-

rural state such as Arizona with only three congressional districts is so great as to warrant separate consideration. The New York City area contains about 15 million people, or about 30 congressional districts, with up to 100 districts for the lower house of the New York, New Jersey, and Connecticut state legislatures. To reach illiterate voters by radio or television would require the purchase of air time to cover the entire metropolitan area, because the metropolitan stations reach this far. This would waste 97% of a congressional candidate's expenditure, and 99% of a legislative candidate's expenditure, so it is almost never done.

Sound trucks, street corner rallies, etc. will reach a few voters, but in New York City, as a practical matter, after a working day and a ride home in a crowded subway, most voters want to go home and do not stop to hear speeches by candidates. Unlike rural areas, where farmers work and live in the same place, urban workers are away from home during working hours and can only be seen in evening hours (about 7-10 p.m.). After people return from vacation on Labor Day, there are usually about two months of campaign time in September and October before election. The evening hours of these 60 days amounts to about 200 hours. No candidate can possibly see the 200,000 voters per congressional district in so little time. To give each voter one hour of explanation orally requires a campaign army of 1,000 voters as workers. No political party in New York has a machine like that any more.

Moreover, Manhattan is an unusually transient borough. It contains many sing-

le persons, as well as a disproportionate number of business executives, airline personnel, diplomats, actors, and seamen, as well as others whose occupation requires extensive travel, and who are often not home even in evening hours. As a practical matter, reaching the mass of Manhattan voters orally is hopeless. For this reason, the principal campaigning in Manhattan is done by mail and by giving out of leaflets at subway exits. Buttons, bumper stickers, and posters are more often found in the more suburban parts of the New York metropolitan area. The suggestion that legislative candidates can actually explain their positions to illiterate voters during the course of a normal campaign in New York City is utterly unrealistic. Such voters will be voting for legislators in complete ignorance of their stands on the issues.

The President signed the Voting Rights Act Amendments into law on the afternoon of June 22, 1970. At 9:15 a.m., June 23, 1970, the five proposed intervenors, as New York City voters, filed an action in the United States District Court for the District of Columbia, entitled Christopher et al. v. Mitchell et al., 1862-70 Civ., to enjoin the enforcement of the new law by United States Attorney General John N. Mitchell, and obedience to it in preference to the New York law, by the New York City Board of Elections. While that suit challenged the whole new law, including age, and residence provisions, particular stress was laid on the literacy test ban.

After a conference among attorneys for the parties, during which plaintiffs' at-

torney urged July deadlines, the attorney for the Justice Department, on July 17, 1970, wrote Chief Judge David L. Bazelon, who had appointed himself as presiding judge of the three-judge court designated to hear this case pursuant to 28 U.S.C. § 2284, that counsel for all parties had agreed that all motions and briefs should be filed by August 3rd and reply briefs by August 11th, and noted: "It is our hope that the hearing on the merits could be held as soon after August 11th as is convenient for the Court." On July 27th the Court responded by lengthening the time for filing briefs (although not requested by any party), and setting September 10th for argument. No reason for the delay was given.

Between August 8th and September 2nd the New York City Board of Elections conducted a special mobile summer registration drive which added 136,282 voters. The Board registered voters who did not pass New York's literacy test provisionally, so they could vote in the November election if Christopher v. Mitchell was not finally decided. Three more registration days remain, October 3, 5 and 6, and a new drive is on to register more voters. See N.Y. Times, Sept. 10, 1970, p. 57, col. 1.

Learning of this drive, on August 18th plaintiffs moved the District Court for an interlocutory injunction pending hearing on the merits. To date, this motion has neither been granted nor denied. On August 28th, plaintiffs moved for an order prior to opinion. This motion, too, has neither been granted nor denied. On oral argument on Sept. 10th, plaintiffs' attorney urged the three-judge court to take

some action in this case, either by way of granting plaintiffs relief, or denying it and allowing plaintiffs to appeal to this Court. Chief Judge Bazelon replied that "The Court will handle this in its own way." Plaintiffs therefore share the evident frustration of Hon. J. Lee Rankin, Corporation Counsel of New York City and former Solicitor-General of the United States, who moved on behalf of the New York City Board of Elections to intervene in this Court, in the studied failure of the District Court to act expeditiously. Nothing the District Court has done to date leads to the presumption that it will dispose of Christopher v. Mitchell before election day, and certainly nothing leads to the belief that it will act in time for this Court to hear any appeal therefrom when it hears this case. The District Court's delay, and the inability of plaintiffs to obtain either relief or a ruling there justifies intervention here.

The recent Republican party primary for United States Representative from western North Dakota, won by a vote of 17,382 to 17,381, reminds us that even a single vote can change an election. N.Y. Times, Sept. 11, 1970, p. 17, col. 1. In 1965, in the Borough of the Bronx, as a result of Sec. 4(e) of the Voting Rights Act of 1965, over 4,000 new Spanish-speaking voters were registered, almost all of whom were reputed to have voted for Herman Badillo, the only Spanish-speaking candidate for Borough President. Badillo's winning margin was 2,086 votes against the incumbent, Joseph F. Periconi, the vote being 198,499 to 196,413. N.Y. Times, Dec. 9, 1965, p. 50, col. 1-4. The New York courts held

that Periconi had no remedy. Periconi v. Power, 48 Misc.2d 391, 265 N.Y.S.2d 22 (1965). While the constitutionality of the federal law was ultimately upheld in this Court (Katzenbach v. Morgan, 384 U.S. 641), had this Court ruled otherwise Periconi would have been unlawfully deprived of his election without remedy. An infusion of illiterate voters could have the same effect. Whatever may be the situation in Arizona, plaintiffs desire to demonstrate that it is so obviously reasonable for the New York legislature to bar illiterate voters from voting in New York because they will be unfamiliar with the issues that Congress could not have justly determined otherwise.

Proposed intervenors are filing herewith the brief originally prepared for the appeal in this matter in Christopher v. Mitchell as proposed brief in intervention. Should that case be decided below every effort will be made to expedite the appeal prior to October 19th, or subsequent to it. In view of the long argument schedule already ordered in the four voting cases, proposed intervenors request 15 minutes for argument. If Christopher v. Mitchell can be brought up, proposed intervenors are willing to rest on the argument made herein without further oral argument.

Sept. 15,1970 Respectfully submitted,

ALFRED AVINS
Attorney for proposed intervenors
Suite 73, 605 West 113th St.
New York City, N.Y. 10025

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 46, Original

UNITED STATES, *Plaintiff,*

— v. —

STATE OF ARIZONA, *Defendant.*

ANSWER and BRIEF FOR THE STATE OF ARIZONA

GARY K. NELSON
Attorney General of Arizona
JOHN M. McGOWAN II
Special Assistant Attorney General
Attorneys for Defendant
Room 159 State Capitol Building
Phoenix, Arizona 85007
Phone: (602) 271-4266

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IN THE

Supreme Court of the United States

October Term, 1970

No. 46, Original

UNITED STATES, *Plaintiff,*

— v. —

STATE OF ARIZONA, *Defendant.*

ANSWER

The State of Arizona, defendant, for its answer to the complaint heretofore filed in the above captioned cause, admits, denies, and alleges as follows:

As to the first cause of action alleged:

I

Admits all of the allegations contained in the first cause of action in plaintiff's complaint except that allegation contained in paragraph VI thereof which alleges that the continued enforcement of Sections 16-101(A)(4) and (5) of the Arizona Revised Statutes in conflict with Section 201 of the Voting Rights Act of 1965, as amended, is violative of the Constitution of the United States, which allegation is specifically denied.

As to the second cause of action alleged:

II

Admits all of the allegations contained in the second cause of action in plaintiff's complaint except that allegation contained in paragraph XII of the complaint which alleges that the continued enforcement of the age requirement for registration and voting contained in the Constitution and Statutes of the State of Arizona in conflict with Section 302 of the Voting Rights Act of 1965, as amended, is violative of the Constitution of the United States, which allegation is specifically denied.

III

Defendant specifically alleges that the enforcement of Sections 201 and 302 of the Voting Rights Act of 1965, as amended, against defendant is prohibited by the Constitution of the United States.

Defendant, having fully answered the complaint herein, prays this Court to enter a declaratory judgment that Sections 201 and 302 of the Voting Rights Act of 1965, as amended, are in violation of the Constitution of the United States and unenforceable against defendant and to render to defendant such other relief as it may be entitled to in the premises.

GARY K. NELSON
Attorney General of Arizona
JOHN M. McGOWAN II
Special Assistant Attorney General
Attorneys for Defendant

October, 1970

7'

IN THE

Supreme Court of the United States

October Term, 1970

No. 46, Original

UNITED STATES, *Plaintiff*,

v.

STATE OF ARIZONA, *Defendant*.

BRIEF FOR THE STATE OF ARIZONA

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in plaintiff's brief, the defendant deems the following constitutional and statutory provisions to be involved in this case:

U.S. Const. art. I, § 2, in part:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *"

U.S. Const. art. I, § 4, in part:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *"

U.S. Const. amend. XIV, in part:

"Section 2. * * * But when the right to vote at an election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

U.S. Const. amend XVIII, in part:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

SUMMARY OF ARGUMENT

While Arizona does not question Congress' authority to enact appropriate legislation to enforce the Four-

teenth and Fifteenth Amendments, this authority can only be upheld when Congress possesses a "special legislative competence" which has not been shown in this case. *South Carolina v. Katzenbach*, 383 U.S. 301 and *Katzenbach v. Morgan*, 384 U.S. 641, carefully read, express the Court's conviction that Congress had ample factual basis for its enactment of the Voting Rights Act of 1965 and that the statute was carefully tailored to remedy a particular constitutional ill.

There is nothing before this Court which indicates that Congress has given the same attention and care to the 1970 Voting Rights Act Amendments. Nothing advanced from the legislative history of the new Act shows that Congress had knowledge of situations peculiar to Arizona or any other state affected. For instance, there is no indication that Congress considered the almost total lack of effective mass communication in northern Arizona where the vast Navajo Reservation is located.

The United States places great reliance on *Gaston County v. United States*, 395 U.S. 285, in support of the proposition that if illiteracy is the result of racially disparate educational opportunities, then any literacy test operates unfairly. That reliance is entirely misplaced. The *Gaston* opinion clearly states, "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements for which the government bore no responsibilities." 395 U.S. at 293, n. 8. Arizona cannot be held responsible for racially disparate educational achievements caused by policies of other governments. There is ample indication that Congress, in deciding the wisdom of suspending all literacy tests, was led to a similar mistaken reliance on this overbroad reading of *Gaston*. This Court cannot, under these circumstances, "perceive a basis upon which Congress might predicate a judgment" that literacy as a voter qualification served no legitimate state interest.

In considering the standard by which the statute is to be measured, we remind the Court that there is a presumption of constitutional validity which applies to statutes which fairly and reasonably classify citizens and therefore Arizona need show no "compelling" interest.

While in voting rights cases, a higher standard has apparently been inferred, it is to be noted that these cases involved classifications which had the potential of permanently disfranchising an identifiable minority. Unlike color or sex, illiteracy need not be a permanent condition.

Nor can it be argued that Arizona is attempting to perpetuate illiteracy as a means of keeping any class from exercising the franchise. On the contrary, over 70 percent of the total state budget is spent on education at all levels. Home study courses, including televised teaching, are available and encouraged in order to combat illiteracy. Considering the negligible number of persons who took advantage of the opportunity to provisionally register under this Court's order, disfranchisement of illiterates has apparently become a *de minimus* problem in Arizona. (Appendix).

Assuming *arguendo* that such an interest must be shown, Arizona does have a "compelling state interest" in literacy as a voter qualification. In addition to Arizona's interest in promoting the honest, responsible and intelligent use of the ballot to insure meaningful elections, the direct government provisions of our State Constitution indicate that Arizona has an especially valid interest in literate voters. The Arizona Constitution provides for initiative and referendum measures to be directly voted on by the qualified state electors. The Arizona Supreme Court long ago said that the voters are thus exercising the legislative function. *Tillotson v. Frohmiller*, 34 Ariz. 394, 271 P. 867. Since the voter is given substantial powers to legislate in Arizona, he must be especially responsible and well-read in order to make

rational decisions. Holding Arizona voters to a minimal standard — literacy — is therefore an especially valid and compelling state interest.

A further indication of the reasonableness and necessity of literacy as a voter qualification is the use of that classification for purposes of naturalization. If literacy in English is necessary to fully integrate foreign born persons into the American political community, it is not unreasonable to require the same of United States natives.

The Congress cannot, regardless of the circumstances of a given case, or the demonstrated desire or need for action by their constituents, pass a statute which alters the plain letter of the Constitution of the United States. The minimum age of 21 years for exercising the voting franchise is engrafted into the Constitution by Section 2 of the Fourteenth Amendment and the several states cannot be prohibited from setting and enforcing that standard by congressional legislation enacted under presumed authority of the Equal Protection Clause of the same Fourteenth Amendment.

If a federal minimum age for voting is to be set at 18 years of age, or otherwise, it must be done through Constitutional Amendment as provided for in Article V of the United States Constitution.

ARGUMENT

I

CONGRESS' AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS BY ENACTING LEGISLATION WHICH SUPERSEDES STATE STATUTES, WHILE EXTENSIVE, CAN BE UPHELD ONLY WHERE CONGRESS POSSESSES A "SPECIAL LEGISLATIVE COMPETENCE" NOT PRESENT IN THIS CASE.

Plaintiff relies principally on two opinions by this Court, *South Carolina v. Katzenbach*, 383 U.S. 301, and *Katzenbach v. Morgan*, 384 U.S. 641, in support of the contention that the 1970 Voting Rights Act Amendments were "appropriate legislation" to enforce the Equal Protection Clause of the 14th Amendment. While we do not dispute the Court's holdings in those cases, it must be pointed out that they decided the constitutionality only of an earlier enactment, namely the 1965 Voting Rights Act. We further note that the opinions in both those cases are very carefully written to express this Court's conviction that Congress had ample factual basis for its enactment of the 1965 Act and that the legislation was carefully tailored to remedy the particular constitutional ill.

For instance, in *South Carolina v. Katzenbach, supra*, the Chief Justice points out that "Congress began work with reliable evidence of actual voting discrimination in a great majority of the states and political subdivisions affected by the new remedies of the Act." 383 U.S. at 329. The opinion also commends Congress' accuracy, saying: "In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." Sprinkled throughout the opinion are the references to "what Congress knew" or "what Congress realized".

Likewise, in *Katzenbach v. Morgan*, Mr. Justice Brennan held that Congress' enactment of § 4(e) of the 1965 Act granting the franchise to Puerto Ricans who have successfully completed the sixth primary grade in an American-flag school in which the language of instruction was other than English reflected "Congress' greater familiarity with the quality of instruction in American-flag schools, a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the federal government's acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth

schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States." 384 U.S. at 658. It is obvious that the Court was quite convinced that Congress considered ample evidence to give them the "specially informed legislative competence" necessary for them to impartially weigh the competing considerations.

In the case at bar, plaintiff has put nothing before this tribunal from which it can gain assurance that Congress has given the same attention and care to the 1970 Voting Rights Act Amendments.

There is nothing advanced from the legislative history to indicate that Congress had knowledge of situations peculiar to Arizona or any other affected state. The rather vague statement by Chairman Raymond Nakai of the Navajo Tribal Council that New Mexico Navajos are more likely to register than Arizona Navajos is not substantiated by any statistics. (Plaintiff's brief, p. 46). Nor is there any indication in the record that Congress, while considering the wisdom of granting the franchise to Arizona illiterates, had knowledge, for instance, that in many areas of the vast Navajo Reservation in northern Arizona there is practically no mass communications media of any language which effectively penetrates the area. There are no full time Navajo language broadcast stations, television is practically non-existent except on the fringes or by expensive cable hookup, and the only Navajo newspaper, the *Navajo Times*, is printed in English.

Under these circumstances, can this Court "perceive a basis upon which Congress might predicate a judgment" that Arizona's literacy qualification did not fulfill a legitimate state interest in maintaining meaningful elections through responsible and intelligent exercise of the ballot? We think not.

Arizona is one of only sixteen states with a literacy requirement. It would have been entirely feasible for

Congress to have held hearings in the states affected by the new amendments in order to perfect its "specially informed legislative competence". No such local hearings were held. Instead, Congress enacted sweeping legislation which affected Arizona and other states without any knowledge of special factors which pertain to local elections. From its determination of the discriminatory effects of literacy tests in some regions, it appears that Congress inferred that such tests were *per se* unfair and could serve no useful state interest. We urge the Court to note the overbreadth of this inference.

II

NO DUTY IS IMPOSED ON ARIZONA TO RECTIFY THE INEQUITIES RESULTING FROM PAST GOVERNMENTAL POLICIES OF OTHER GOVERNMENTS BY THE FACT THAT UNFAIRLY TREATED MINORITY GROUP MEMBERS MAY HAVE MOVED HERE.

In plaintiff's brief, great reliance is placed upon a broad construction of the opinion in *Gaston County v. United States*, 395 U.S. 285. The United States Attorney General has apparently construed the Court's language in that case to say, in effect, that if a member of an identifiable minority has suffered educational inequities because of invidious discrimination by any state or political subdivision, the obligation to rectify this inequity follows that person to any state to which he might migrate. In short, if a Negro is illiterate because of segregated schooling policies in his native state, it becomes Arizona's duty to "make it right" by granting him the franchise if he moves here. While we express no view as to the fairness of such a doctrine, we most urgently point out that the *Gaston* opinion does not admit of such a broad reading. Mr. Justice Harlan quite carefully noted, "We conclude that . . . it is appropriate

for a court to consider whether a literacy or educational requirement has the 'effect of denying the right to vote on account of race or color' because *the State or political subdivision which seeks to impose the requirement* has maintained separate and inferior schools for its Negro residents who are now of voting age." (Emphasis added). 395 U.S. at 293. But then, just as carefully, Mr. Justice Harlan states, "We have no occasion to decide whether the Act would permit reinstatement of a literacy test in the face of racially disparate educational or literacy achievements *for which the government bore no responsibility.*" (Emphasis added). 395 U.S. at 293, n.8.

The policy of the Court in adjudging the constitutionality of United States statutes is firm: "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of Constitutional law in advance of the necessity of deciding it; the other, *never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.*" (Emphasis added). *United States v. Raines*, 362 U.S. 17, 21.

We further point out that Congress relied on this erroneously broad reading of *Gaston* when considering the enactment now in question. See House Hearings, pp. 54-56 (testimony of Howard A. Glickstein); 221-225 (Attorney General Mitchell); Voting Rights Hearings, pp. 184-188 (Attorney General Mitchell); 116 Cong. Rec. 2770 (daily ed. March 2, 1970, Senator Hruska). While this Court stated in *Katzenbach v. Morgan* that "it is not for us to review the congressional resolution of these factors", 384 U.S. at 653, judicial action is assuredly called for when erroneous factors are used in the congressional resolution.

In any event, this Court stated in *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685, that, ". . . in compliance with its treaty obligations the *Federal Govern-*

ment has provided for roads, education and other services needed by the Indians." The Court concluded that, ". . . since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this [state privilege] tax." 380 U.S. at 691-692. (Emphasis added).

By the very language of *Warren Trading Post*, Arizona is brought within the exception provided for in Footnote 8 of the *Gaston* decision. As was determined in the *Warren Trading Post* case, Arizona clearly has "no responsibility" for the literacy or lack of it of a large part of its citizens by virtue of federal responsibility. True, as this Court said on June 15, 1970, in *Evans v. Cornman*, 398 U.S. 419, the fiction of a "state within a state" has been rejected and cannot now be revived. But it is the contention of Arizona that the plain words of *Warren Trading Post* relieve it of responsibility and give to the State of Arizona the protection of the *Gaston* case.

III

THERE IS A PRESUMPTION OF CONSTITUTIONAL VALIDITY WHICH APPLIES TO STATE STATUTES WHICH FAIRLY AND REASONABLY CLASSIFY CITIZENS. ARIZONA NEED SHOW NO "COMPELLING INTEREST".

Not all classifications are a denial of equal protection. "To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' *Tignor v. Texas*, 310 U.S. 141, 147. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi v. Yeager*, 384 U.S. 305, 309.

While it is true that "notions of what constitutes equal treatment for purposes of the equal protection clause *do* change", as this Court pointed out in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669, the logic of the language of the *Rinaldi* opinion cannot be disputed. There is a measurable difference between those who can read and write and those who have not mastered such basic skills. They are "different in fact". Barring some extraordinary circumstance, there is no justification for requiring them to be "treated in law as through they were the same".

While the United States takes the view that extraordinary circumstances, namely, invidious discrimination, are present, the plain truth is that, "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show." *Lassiter v. Northampton County Board of Elections*, 360 U.S. 44, 51. While Arizona does not deny that literacy tests have been unfairly administered in some states, there is no allegation that this state uses its literacy test in a manner designed to unfairly discriminate against any specified group. We have already shown the fallacy of the United States' reliance upon *Gaston* as a basis for any transferrable responsibility for earlier inequalities and will not dwell upon that further.

As Mr. Justice Black pointed out in his well-reasoned dissent in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, "The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not 'irrational', 'irrelevant', 'unreasonable', 'arbitrary', or 'invidious'." No serious claim has been made that Arizona's classification of voters by literacy falls into one of these categories. Unlike the case of *Katzenbach v. Morgan*, no showing has been made that Arizona's literacy test effectively disfranchises any identifiable minority.

"Of course it has always been recognized that nearly all legislation involves some sort of classification, and the Equal Protection test applied by this Court is a narrow one: a state enactment or practice may be struck down under the clause only if it cannot be justified as founded upon a rational and permissible state policy." Mr. Justice Harlan, dissenting in *Katzenbach v. Morgan*, 384 U.S. 641, 660.

Although it is suggested by the United States that because voting is a "fundamental liberty" a broader standard should be applied in this case, Arizona agrees with Mr. Justice Harlan that, "no such dual-level test has ever been articulated by this Court . . . ". 384 U.S. at 661 (dissent).

The cases from which the so-called "compelling state interest" standard is inferred have invariably dealt with a classification which had the potential for permanent disfranchisement. See, e.g. *Baker v. Carr*, 369 U.S. 186; *Reynolds v. Sims*, 377 U.S. 533; *Carrington v. Rash*, 380 U.S. 89; *Cipriano v. City of Houma*, 395 U.S. 701; *City of Phoenix v. Kolodziejski*, 399 U.S. 204; *Kramer v. Union Free School District*, 395 U.S. 621.

The rationale for the usual presumption of validity given to statutes is that the Legislature is presumed to reflect the will of the people as they speak through their ballots. *Kramer v. Union Free School District*, 395 U.S. 621. But when that voice is distorted through malapportionment or invidious classifications drawn along the lines of wealth or race, then the presumption must fall and the restriction on the franchise must be more closely examined. Without this safeguard, governmental units could simply classify out of the voting booth those voters who might oppose them, smugly relying on the presumed constitutionality of the classification.

But such is not the case here. No attempt is made to permanently disfranchise any class. Illiteracy, unlike

color or sex, need not be a permanent condition. Little children are learning to read every day, just as are adults in special education classes. Arizona expends almost 70 per cent of the total state budget appropriation on the state's common and high schools alone. Home study courses, including televised teaching, provide educational opportunities for those who can't attend regular classes. Considering the wide availability of basic education, promoted and encouraged by Arizona, those who cripple themselves by remaining illiterate must be deemed to have done so by choice. If Arizona citizens choose to remain illiterate, it is not unfair for the state to refuse to register them as voters, no more than it is unfair for a state to refuse to register those who choose to live in another state.

We further point out that illiteracy is a problem which has been largely solved in this country. The United States enjoys one of the highest literacy rates in the world. Arizona is no exception to this general rule. Upon the order of this Court, Arizona allowed illiterates to register provisionally pending the outcome of this litigation. The availability of this provisional registration was widely publicized by statewide news media, especially broadcast outlets. Nonetheless, only eighteen illiterates were registered under this provision. (See Appendix of Affidavits).

In Maricopa County, Arizona's most populous, only twelve persons out of a total population of 962,918 took the opportunity to register. This small turnout in the face of both statewide and national discussion of the issue can only be taken as an indication that the problem of disfranchisement of illiterates in Arizona is *de minimus*.

Thus, in determining the constitutionality of Arizona's statute, the Court need not scrutinize the classification as closely as is required to determine a "compelling state interest". As was stated in *Harper v. Vir-*

ginia State Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, ". . . under a proper interpretation of the Equal Protection Clause states are to have the broadest kind of leeway in areas where they have a general constitutional competence to act."

Nor is there any question that Arizona has a "general constitutional competence to act" in setting reasonable voter qualifications. "It has long been settled law that the states have the power to prescribe reasonable and nondiscriminatory qualifications for voting in federal as well as state elections." *Hall v. Beals*, 292 F. Supp. 610 (1968). Literacy tests have never been deemed *per se* discriminatory. Contrarily, it was held in *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, that the constitutionality of literacy tests as such is clear.

In short, Arizona need show no "compelling state interest" in requiring literacy as a prerequisite to voting. It suffices to show a rational relationship of the statute to a legitimate end.

The general rule was best stated in *Metropolitan Casualty Insurance Co. of New York v. Brownell*, 294 U.S. 580 at 584, where Justice Stone said: "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

IV

ARIZONA DOES HAVE A "COMPELLING INTEREST" IN MAINTAINING LITERACY AS A VOTING QUALIFICATION, ASSUMING *ARGUENDO* THAT SUCH AN INTEREST MUST BE SHOWN.

Generally speaking, it can hardly be denied that pro-

moting the honest, responsible and intelligent use of the ballot to insure meaningful elections is a compelling state interest. But Arizona has an especially compelling interest in requiring its voters to be literate.

The Arizona Constitution specifically reserves to the voters the power to enact laws and constitutional amendments and the power to review the acts of the formal Legislature. The Arizona Constitution, Article IV, Section 1 (1) states: ". . . [T]he people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature; and they also reserve . . . the power to approve or reject at the polls any Act, or item, section, or part of any Act, of the Legislature." The people acting under this section, are exercising the legislative function. *Tillotson v. Frohmiller*, 34 Ariz. 394, 271 P. 867. No statute in Arizona, unless passed by a two thirds' majority of the Legislature, becomes law for ninety days in order to give five per centum of the qualified electors an opportunity to refer to the people the statute in question. *(Constitution of Arizona, Art. 4 Pt. 1 § 3).*

The voter, thus given substantial power to legislate in our state, must be fully able to understand the text of the laws he has the power to make or revise in order to make rational and intelligent decisions rather than choices based on emotion or on somebody else's interpretation of the issues.

The vote of the uninformed or the illiterate counts just as heavily as the carefully considered ballot of the responsible and well-read voter who seeks to exercise the legislative function reserved to him by the State Constitution. The franchise is thus a potential danger in the hands of those who do not fully understand the implications of the laws they have the power to pass on.

"The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." *Lassiter v. Northampton County Board of Elections*, 360 U.S. 44. We urge the Court to note that this relationship applies a *fortiori* where, as in Arizona, the voter is given substantial powers to exercise the legislative function above and beyond the usual power of the ballot.

V

THE REASONABLENESS AND NECESSITY OF LITERACY AS A VOTER QUALIFICATION IS FURTHER INDICATED BY THE USE OF THAT CLASSIFICATION FOR PURPOSES OF NATURALIZATION.

As Mr. Justice Harlan points out in his dissent to *Katzenbach v. Morgan*, "It is noteworthy that the Federal Government requires literacy in English as a prerequisite to naturalization, 66 Stat. 239, 8 U.S.C. § 1423 (1964 ed.), attesting to the national view of its importance as a prerequisite to full integration into the American political community." 384 U.S. at 663.

Consider the curious posture of the law if foreign-born illiterates are disfranchised while native illiterates are allowed to vote. In light of the application of the Equal Protection Clause to "any person" within the jurisdiction of the United States, rather than applicability being restricted to citizens, such a classification may well be viewed as running afoul of the constitutional guarantee. The possible result would be voting by aliens familiar with neither American culture nor our democratic governmental system.

VI

THE CONSTITUTION OF THE UNITED STATES DOES NOT CONFER UPON THE CONGRESS, EITHER EXPRESSLY OR BY ANY REASONABLE IMPLICATION, THE RIGHT TO SET THE NATIONWIDE MINIMUM VOTING AGE AT 18 YEARS, OR ANY AGE OTHER THAN THE 21 YEARS SPECIFICALLY REFERRED TO IN THE CONSTITUTION.

At the outset, several matters should be made perfectly clear as to Arizona's position regarding Title III, Voting Rights Act Amendments of 1970, P.L. 91-285, 84 Stat. 314.

We are in complete agreement with the United States that the legislative process is much better suited to developing what is admittedly an arbitrary standard of age when everyone is constitutionally presumed to be old enough to intelligently exercise the franchise, whether he or she does so or not.

Arizona does not take issue with the factual determination of Congress concerning why the 18 year old should be given the franchise, even though there will always be individual citizens who will disagree with those conclusions.

Nor does Arizona contend for a review or revision of the decisions of this Court, both old or new, setting forth standards for interpreting the power of Congress in enforcing the provisions of the Federal Constitution, particularly § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment. *E.g. McCulloch v. Maryland*, 4 Wheat. 316; *South Carolina v. Katzenbach*, 383 U.S. 301; *Katzenbach v. Morgan*, 384 U.S. 641; *Kramer v. Union Free School District*, 395 U.S. 621; *Cipriano v. City of Houma*, 395 U.S. 701; *Phoenix v. Kolodziejski*, 399 U.S. 204; *Evans v. Cornman*, 398 U.S. 419.

Insofar as is consistent with the preceding three paragraphs, and so as to avoid as much as possible unnecessary duplication of argument, Arizona adopts the argument of its sister states of Oregon (No. 43 Original) and Texas (No. 44 Original) as presented in their briefs to this Court in those aforementioned cases now consolidated with this case for consideration of this identical question.

There still remains the question of applicability of the standards and principles to the case at bar. It is here that principles and standards of constitutional interpretation, as well as the findings of the Congress must give way when faced with the language of the Constitution itself. Section 2 of the Fourteenth Amendment provides, in pertinent part:

> "But when the right to vote at an election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

The United States brushes aside this specific constitutional acceptance of the age of 21 years as the minimum age which can be enforced against the States by the Federal Government with a one paragraph reference to an earlier paragraph emphasizing that the Equal Protection Clause of the Fourteenth Amendment applies to voting matters (Brief for the United States, pages 73-75). The only case cited is *Dennis v. United States*, 171 F.

2d 986 (CA. D.C.) for the proposition that the specific machinery of reducing a state's representation in the Federal Congress has never been invoked. The logic or legal conclusion that would lead from there to the ultimate conclusion that the amendment thus has nothing to say of a constitutional nature concerning the minimum age of citizens for exercising the franchise, escapes this defendant.

The decisions of this Court, as has been pointed out by Texas and Oregon, *supra*, are absolutely consistent in leaving to the states the fundamental responsibility placed there by the Constitution to establish, on a non-discriminatory basis, and in accordance with the specific directions or prohibitions of the Constitution, qualifications for the exercise of the franchise. E.g., *Kramer v. Union Free School Dist., supra; Carrington v. Rash*, 380 U.S. 89; *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45. The United States does not dispute this general point.

It is clear that had Justice Douglas been writing for the Court in *Lassiter v. Northampton County Board of Elections, supra*, in 1919, instead of 1959, he could well have included sex, along with residency requirement, age, and previous criminal record as obvious factors a state could take into consideration in determining qualifications for voters. *Minor v. Happersett*, 21 Wall. 162.

Thus it was on August 26, 1920, with the Proclamation by the Secretary of State, the 19th Amendment of the Constitution was declared ratified. 41 Stat. 1823; U.S. Const. Amend. XIX. The matter of universal male suffrage was changed to universal suffrage in the only way contemplated by the Constitution — by a subsequent amendment (U.S. Const. Art. V).

It goes without saying that the cry for women's suffrage was as forceful and as fully documented as was

the case for the 18 year old vote. The matter was continuously debated for almost 40 years before an amendment was proposed. Ida Husted Harper, *The History of Women's Suffrage*, Vol. V (1922); Catt and Shuler, *Women's Suffrage and Politics* (1926). Once proposed, the amendment was quickly ratified by the requisite number of states. 41 Stat. 362; 41 Stat. 1823, supra; U.S. Const. Amend. XIX.

Even as late as 1962, the Congress felt compelled to submit to the several states a constitutional amendment to prohibit the imposition of a poll tax on the right to vote for federal officers. U.S. Const. Amend. XXIV.

We cannot now question the wisdom of the framers at the time either the original Constitution or the Amendments were adopted. Their genius was such that the document could be changed from time to time as conditions required — not by Congress alone, but by the people, through their elected representatives at both the federal and state level. U.S. Const. Art. V, *supra*.

This Court put it very succinctly in its decision of *Dillon v. Gloss*, 256 U.S. 368:

"Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the states shall be taken as a decisive expression of the people's will and be binding on all." 256 U.S. at 374.

All the decisions on construction and all the factual reasons developed by the Congress, regardless of their validity in the abstract, or in cases other than ones specifically covered by the Constitution itself, cannot justify amendment of the letter of the Constitution except by constitutionally dictated methods.

We thus face here the acid test of our system. Recognizing an almost universally acclaimed failing in our present governmental structure as regards the extension of the franchise to citizens between the ages of 18–21 years, can we still maintain the discipline necessary to follow the Constitution as it is written, wherein the remedy is clearly set forth? If we can, the people will still continue to govern. If we fail here, it will only be a matter of time till other clear constitutional [illegible] ments will be similarly expeditiously abrogated. The end of constitutional government, as we know it, will not be far behind.

CONCLUSION

For the foregoing reasons, the United States should be denied the relief sought in its complaint herein.

Respectfully submitted,

GARY K. NELSON
Attorney General of Arizona

JOHN M. McGOWAN II
Special Assistant Attorney General

[redacted]

October, 1970

H. LYLE GRANT
COUNTY RECORDER

ETHEL SHERMAN
DEPUTY RECORDER

OCT 7 '70 AM

OFFICE OF COUNTY RECORDER

County of Graham

STATE OF ARIZONA

SAFFORD

ATTORNEY GENERAL
STATE OF ARIZONA

STATE OF ARIZONA

COUNTY OF GRAHAM

I, H. Lyle Grant, County Recorder in and for the County and State aforesaid, being first duly sworn upon oath deposes and saith:

In accordance with the agreement with the Attorney General I allowed any person who could not read the Constitution of the United States in the English language or write their name or both to provisionally register to vote between October 24, 1970, and December 14, 1970.

Publicity regarding this was on all media, newspapers, radio, and television so that all persons who were illiterate who wished to register to vote would be aware that he could do so during this period of time.

During this period no illiterate person in the County of Graham, according to the preliminary figures of the 1970 Census, * availed themselves of this support to personally register to vote even though they could not pass the literacy test of the State of Arizona.

WITNESS my hand and official seal this fifth day of October, 1970.

H. Lyle Grant
Graham County Recorder

* The foregoing is based upon a 1970 county census of 16,327, preliminary count.

Ida Mae Smyth
RECORDER

PIMA COUNTY
STATE OF ARIZONA
TUCSON
OFFICE OF THE RECORDER

ATTORNEY GENERAL
STATE OF ARIZONA

AFFIDAVIT

STATE OF ARIZONA
County of Pima ss

I, Ida Mae Smyth, being first duly sworn upon oath, deposes and says:

In accordance with the agreement with the Attorney General, I allowed any persons who could not read the constitution of the United States in the English Language or write their name, or both, to provisionally register to vote between August 24, 1970 and Sept. 14, 1970.

I arranged for publicity on all media; Newspapers, Radio and Television, so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period 0 number of people out of the total of 344,635 people in the County according to the preliminary figures of the 1970 census availed themselves of this opportunity to provisionally register to vote, even though they could not pass the literacy test of the State of Arizona.

Dated: Oct 6. 1970 Ida Mae Smyth
Ida Mae Smyth, County Recorder

CARA N. BETTS
RECORDER

HOWARD W. WALDIE
DEPUTY

OFFICE OF THE

COUNTY RECORDER

YUMA COUNTY

YUMA, ARIZONA

October 5, 1970

CARA N. BETTS, being first fuly sworn upon oath, deposes and says: In accordance with the agreement with the Attorney General, I allowed any person who could not read the Constitution of the United States in the english language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970.

I arranged for publicity on all media; newspaper, radio and television so that any person who was illiterate, who wished to register to vote would be aware that he could do so during this period of time.

During this period then ____ _of people

__X__ none at all

out of a total of 60,077 people in the county according to the preliminary figure of the 1970 Census availed themselves of this opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Cara N. Betts
County Recorder

Subscribed and sworn to before me. this ___ day of Oct., 1970 by Cara N. Betts, County Recorder of Yuma County, Arizona.

Barbara Ali
Barbara Ali, Notary Public

My Comm. Expires May 19, 1973

STATE OF ARIZONA)
) ss.
County of Yavapai)

Norma R. Marquart, Recorder of Yavapai County, Arizona, being first duly sworn, upon oath, deposes and says: That in accordance with the agreement with the Attorney General of the State of Arizona, I allowed any persons who could not read the Constitution of the United States in the English language or write their name, or both, to provisionally register between August 24, 1970 and September 14, 1970, to vote in Yavapai County. To affiant's knowledge, no persons availed themselves of this opportunity to provisionally register to vote. *

Norma R. Marquart
Yavapai County Recorder

SUBSCRIBED and sworn to before me this 5th day of October, 1970.

Joan C. Bailey
Notary Public

My Commission expires August 18, 1971.

* The foregoing is based upon a 1970 county census of 35,869, preliminary count.

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

A F F I D A V I T

STATE OF ARIZONA,)
: ss.
County of Apache.)

VIRGIE B. HEAP, being first duly sworn upon oath, deposes and says: In accordance with the agreement with the Attorney General, I allowed any persons who could not read the Constitution of the United States in the English language or write their name or both, to provisionally register to vote between August 24, 1970, and September 14, 1970. I arranged for publicity by a letter to all registration officers so that any person who wished to register to vote could be aware that he could do so during the period of time. During this period of time, two people out of a total of 32,237 people in the County according to the preliminary figures of the 1970 census availed themselves of this opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Virgie B. Heap
VIRGIE B. HEAP
APACHE COUNTY RECORDER

Subscribed and sworn to before me this 5th day of October, 1970.

(SEAL)

J. K. Hansen
Notary Public

My Commission Expires August 4, 1973.

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

A F F I D A V I T

STATE OF ARIZONA,)
: ss.
County of Navajo.)

JAY H. TURLEY, being first duly sworn upon oath, deposes and says in accordance with the agreement with the Attorney General I allowed any persons who could not read the Constitution of the United States in the English language or write their name, or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

I, ~~arranged~~ DID NOT ARRANGE for publicity on all media, newspapers, radio and television so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period 1 number of people out of a total of 45,951 people in the county according to the preliminary figures of the 1970 census availed themselves of this opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Jay H. Turley
Navajo County Recorder

Subscribed and sworn to before me this 6 day of October, 1970.

Lee McClene
Notary Public, Navajo County, Arizona

My Commission expires:
May 21 1972

STATE OF ARIZONA)
) ss.
COUNTY OF PINAL)

I, SOPHIE M. SMITH, the duly elected and qualified County Recorder of Pinal County, State of Arizona, being first duly sworn, on my oath depose and say:

By agreement with the Attorney General of Arizona, and in compliance with the order of the Supreme Court of the United States, I allowed persons who could not read the Constitution of the United States in the English language, or who could not write their name, or both, to provisionally register to vote between August 24th, 1970, and September 14th, 1970. This was publicized in all media so that any person who was illiterate and who wished to register to vote would be aware that he could do so during this period.

During this period of time, 1 person out of 67,876 total population in the county, according to the preliminary figures of the 1970 census, availed himself of this opportunity to provisionally register to vote, even though he could not meet the literacy qualifications as provided for by Arizona Statutes.

It should be noted in this context that this person was unable to write his name and therefore was identifiable as an illiterate. Previously in this county, the statutes have been interpreted to mean that the literacy qualification was exactly that and nothing else. This meant that if a person could write his name and was willing to subscribe on his oath that he met all qualifications, including the literacy qualification, he was considered so qualified.

Birth certificates were not required to be produced as proof of age, and neither was actual testing of ability to read performed, as such testing was not considered to be the duty of the Registration Officer. Accordingly, it is possible and even probable that there are now registered in this county persons who would be baffled by such words and phrases as "concurrence", "emolument", or "domestic Tranquility", and therefore are not literate within the strictest construction of the statutes.

Given under my hand and seal this 5th day of October, 1970.

Sophie M. Smith

SOPHIE M. SMITH
Pinal County Recorder

SUBSCRIBED AND SWORN TO before me this 5th day of October, 1970.

Evelyn Jones

Notary Public

My Commission Expires
May 31st, 1973

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

PAUL N. MARSTON, being first duly sworn upon oath deposes and says:

In accordance with the agreement with the Attorney General, I allowed any persons who could not read the Constitution of the United States in the English language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970.

I arranged for publicity on all media: newspapers, radio and television, so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time. During this period twelve (12) people out of a total of 962,918 people in the county according to the preliminary figures of the 1970 census availed themselves of this opportunity to provisionally register to vote, even though they could not pass the literacy test of the State of Arizona.

Paul N. Marston
Paul N. Marston
Maricopa County Recorder

Subscribed and sworn to before me this 7th day of October 1970.

Lois C. Choate
Notary Public

My commission expires:
May 17, 1972

PEGGY B. SMITH
RECORDER

OFFICE OF THE
RECORDER
OF MOHAVE COUNTY
KINGMAN, ARIZONA

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

STATE OF ARIZONA,)
) SS.
COUNTY OF MOHAVE.)

I, PEGGY B. SMITH, Recorder of the County of Mohave, State of Arizona, being first duly sworn upon oath depose and says, in accordance with agreement with the Attorney General I allowed any person who could not read the Constitution of these United States in the English language or write their name or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

During the period between August 24, 1970 and September 14, 1970 no person out of a total of 25,110 people in the county according to the preliminary census of 1970 availed themselves of this opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Witness my hand this 6th day of October, 1970.

Peggy B. Smith
Peggy B. Smith
Mohave County Recorder

Subscribed and sworn to before me this 6th day of October, 1970, by Peggy B. Smith.

Robert L. Spear
Notary Public

My Commission Expires:
My Commission Expires Mar. 15, 1974

Edna Mae Thornton
OFFICE OF THE RECORDER
Coconino County

STATE OF ARIZONA COUNTY OF COCONINO

Edna Mae Thornton being first duly sworn upon oath deposes and activates out the agreement with the Attorney General allowing any persons who could not read the Constitution of the United States in the English language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970. I arranged for publicity on all media, newspapers, radio and television, so that any person who was illiterate, who wished to register to vote would be arranged that he could do so during this period of time.

During this period no people out of a total of 47,355 of people in the county according to the preliminary figure of the 1970 census availed themself of this opportunity to previously register to vote even though they could not pass the literacy test of the State of Arizona.

Edna Mae Thornton
County Recorder

Subscribed and sworn to before me this 5th day of October, 1970.

My commission expires:
July 21, 1972

Beatrice B. Howard
Notary Republic

[redacted]

[redacted]

OCT 7 7:30 AM

COUNTY OF COCHISE

OFFICE OF THE RECORDER
BISBEE, ARIZONA

ATTORNEY GENERAL
STATE OF ARIZONA

AFFIDAVIT

State of Arizona) ss
County of Cochise)

October 5, 1970

James O. Dixon, first duly sworn upon oath, deposes and says, in accordance with the agreement with the Attorney General, he allowed, any persons who could not read the Constitution of the United States in the English language or write their name or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

To the best of his knowledge, no deputy registrar, Justice of the Peace, or any employee in the Recorder's office turned away any otherwise qualified person who wished to register upon the basis of illiteracy in any form. In other words, there was no one provisionally registered in Cochise County. *

James O. Dixon
James O. Dixon
Cochise County Recorder

State of Arizona) ss
County of Cochise)

This instrument was acknowledged before me this 14th day of October 1970 by

Connie Faulconer
~~Notary Public~~ Deputy Clerk
Superior Court

~~My commission will expire~~

* The foregoing is based upon a 1970 county census of 60,394 and an unofficial 1970 voter registration of 19,960.

OCT 7 '70 AM

ATTORNEY GENERAL
STATE OF ARIZONA

STATE OF ARIZONA)
: SS
COUNTY OF GILA)

I, DORIS PARKIN, being first duly sworn upon oath deposes and says:

In accordance with the agreement with the Attorney General I allowed any person who could not read the constitution of the United States in the English language or write their name or both to provisionally register to vote between August 24, 1970 and September 14, 1970. I arranged for publicity on all media - newspapers - radio - T.V. so that any person who was illiterate who wished to register to vote would be aware that he could do so during this period of time.

During the period NONE people out of a total of 28,412 people according to the prelimary figures of the 1970 census availed themselves of the opportunity to provisionally register to vote even though they could not pass the literacy test of the State of Arizona.

Gila County Recorder.

Subscribed and sworn to before me this 5 day of October, 1970.

Notary Public.

My Commission Expires November 11, 1975.

G. ESPINOSA MORENO
County Recorder

COUNTY RECORDER
SANTA CRUZ COUNTY
NOGALES, ARIZONA, 85621

Office of the Attorney General
ATTORNEY GENERAL
STATE OF ARIZONA

AFFIDAVIT

STATE OF ARIZONA)
: ss.
County of Santa Cruz)

I, G. ESPINOSA MORENO, being first duly sworn upon my oath depose and say:

In accordance with the agreement with the Attorney General I allowed any persons who could not read the Constitution of the United States in the English language or write their names or both, to provisionally register to vote between August 24, 1970 and September 14, 1970.

I arranged for publicity on all media, newspapers, radio and television so that any person who was an illiterate and wished to register to vote, would be aware that he could do so during this period of time.

During this period two (2) persons, out of a total of 14,500 according to the preliminary figures of the 1970 census, availed themselves of this opportunity to provisionally register to vote, even though they could not pass the literacy test of the State of Arizona.

G. Espinosa Moreno
Santa Cruz County Recorder

Subscribed and sworn to before me at Nogales, Arizona, this 6th day of October, 1970 by G. Espinosa Moreno.

Notary Public

FILE COPY

Supreme Court, U.S.
FILED
OCT 12 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47 Original

UNITED STATES, Plaintiff,	)
v.	)
STATE OF IDAHO Defendant.	)

BRIEF FOR THE STATE OF IDAHO

ROBERT M. ROBSON
Attorney General
State of Idaho

RICHARD H. GREENER
Assistant Attorney General
State of Idaho
Statehouse
Boise, Idaho 83707

Attorneys for Defendant

ATTORNEY GENERAL
STATE OF ARIZONA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47 Original

UNITED STATES	)
Plaintiff,	)
v.	)
STATE OF IDAHO	)
Defendant.	)

BRIEF FOR THE STATE OF IDAHO

JURISDICTION

The State of Idaho accepts and agrees with the jurisdictional arguments set forth in the Plaintiff's Brief.

QUESTION PRESENTED

The question as presented to the Court in this matter, is accurately stated in Plaintiff's Brief as:

Whether the Voting Rights Act Amendments of 1970, 84 Stat. 314, are constitutional insofar as they (1) restrict durational residency requirements in regard to voting for president and vice-president and pre-

scribe uniform standards regarding absentee registration and absentee balloting in presidential elections and (2) prohibit the states from denying the vote on account of age to any otherwise qualified person 18 years of age or older in any election. The statutory and constitutional provisions involved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Const. art. I, §2:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature. * * *"

U. S. Const. art. II, §2:

> "Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: * * *"

U.S. Const. amend. X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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U. S. Const. amend. XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of the State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall

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be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

U. S. Const. amend. XV:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

U. S. Const. amend. XVII:

"The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

Article 6, Section 2 of the Idaho Constitution provides:

Qualifications of electors.--Except as in this

article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

Section 34-401, 34-408, 34-409, 34-413, 34-1101 and 34-1105 provide in pertinent part:

34-401. Qualifications of voters.--Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months im-

mediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34-408. Eligibility of new residents to vote.--Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state, except

the requirement of residence and registration, and

(2) he complies with the provisions of this act.

34-409. Application for presidential ballot by new residents.--A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34-413. Voting by new residents.--(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34-1101. Absent voting authorized.--Any qualified elector of the state of Idaho who is absent or expects to be absent from the

election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be, unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34-1105. Return of ballot.--On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretely. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

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STATEMENT

The Voting Rights Act Amendments of 1970, 84 Stat. 314 (hereinafter referred to as the "Act") was passed by Congress and signed into law by the President of the United States on June 22, 1970. There are two provisions in this Act relevant to the case at bar. These are Titles II and III, which purport to abrogate the individual states' right to set qualifications for voting.

Title II of the Act seeks to make uniform all residency and absentee voter requirements (hereinafter referred to generally as residency requirements) for presidential and vice-presidential elections. The relevant provision would restrict this requirement in any state to thirty (30) days. This is in direct conflict with Idaho's constitutional and statutory law.[1]

Title III of the Act seeks to preclude the state from setting age requirements in excess of eighteen years as a qualification for voting in all types of elections. This provision is in direct conflict with Article 6, Section 2 of the Idaho Constitution which sets the mandatory age of twenty-one years as a requirement to exercise enfranchisement privileges in the State of Idaho.

The Governor of the State of Idaho was informed by the Attorney General of the United States, the official

1. Article 6, Section 2 of the Idaho Constitution; Section 34-401, Section 34-408, Section 34-409, Section 34-413, Section 34-1101, Section 34-1105 of the Idaho Code.

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statutorily charged with the enforcement of the Act, that the State of Idaho was to comply with the new Act. The Governor contacted the Attorney General for the State of Idaho who advised the Governor that he had grave doubts as to the constitutionality of Titles II and III of the Act. The State of Idaho has, as a result of this advice, respectfully refused to accede to the request of the United States Attorney General. This action followed to compel the State of Idaho to comply with Title II and III of the Act.

SUMMARY OF ARGUMENT

The Congress of the United States has enacted legislation which abrogates certain voter qualification standards required by the Idaho State Constitution and Idaho statutory law. These are Titles II and III of the Act. The provisions found in the Idaho Constitution and statutory law condition the right to vote upon reasonable residency and age requirements.

Congress in so legislating has relied upon Section 5 of the Fourteenth Amendment. This provision is sought to be used by Congress as a means to circumvent the enumerated powers doctrine and satisfy the requirement that a specific enumerated power exists, thereby enabling Congress to so legislate.

The right to set voter qualification standards has since the framing of the United States Constitution rested with the states. This usurpation of this state function is in

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contravention of the principles espoused in the United States Constitution and decisions of this Court. The state has the right to establish such standards so long as they are not discriminating.

The State of Idaho argues that this reliance upon Section 5 of the Fourteenth Amendment is illfounded and contrary to other provisions in the United States Constitution. The state would assert that the express requirements of provisions of the United States Constitution vest the right to set voter qualification standards pertaining to residency and age requirements in the individual states. The State additionally submits that this is not a denial of equal protection rights set forth in the Fourteenth Amendment. The legislation, then, is an over amplification of Congressional prerogatives pursuant to Section 5 of the Fourteenth Amendment.

The abrogation of the right of the individual states in these instances is in total opposition to the letter and spirit of the United States Constitution. These statutes must be held unconstitutional.

ARGUMENT

I.

THE PROVISIONS OF THE UNITED STATES CONSTITUTION AND DECISIONS OF THIS COURT REQUIRE THAT THE INDIVIDUAL STATES BE PERMITTED TO ESTABLISH VOTER QUALIFICATIONS PERTAINING TO RESIDENCY AND AGE.

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The express language of the United States Constitution and the great weight of case law clearly require that the standards for voter qualification insofar as residency and age requirements are concerned be left to the discretion of the individual states. This principle finds its origin in the history of the United States and, indeed, is reflected in such documents as the Federalist. [2]

The Congress of the United States by enacting Titles II and III of the Act obviate this mandate. The following analysis will consider provisions of the United States Constitution and holdings of this Court which are relevant to this issue and clearly support this assertion.

The most logical point to initiate this analysis is with the relevant constitutional provisions. Article I, Section 2 of the United States Constitution provides a primary basis for the assertion that the right to set voter qualifications rests with the individual states. This provision states in relevant part:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state lagislature."

The above provision referring to requirements for election of members of the House of Representatives expressly keys the election to this national body upon state law.

2. The Federalist, No. 59, at 404-405 (Bourne ed. 1901) (Hamilton).

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The offices of President and Vice-President are referred to in Article II, Section 2 of the Constitution as amended by the Twelfth Amendment which provide for their manner of election, the pertinent portions of Article II, Section 2 state:

> "Each state shall appoint, in such manner as the legislature thereof may direct, the number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress:. . ."

The individual states, then, are recognized by the above constitutional provision as exercising control over the appointment of electors to determine who will be President and Vice-President of the United States.

The Seventeenth Amendment to the United States Constitution provides further indication that voter qualifications are left to the discretion of the individual states. The relevant portions of this Amendment provide:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; . . .The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."

It is clear from these articles and amendments of the United States Constitution that the states are vested with the power to determine qualifications for the electors of President, Vice-President, Senators and Representatives.

Implicit in the vesting of this power in the individual states is the lesser included power to establish non-discriminatory residency and age standards.

The assertion that the individual states may restrict the legal voting age to twenty-one years and over is substantiated by express language of the Constitution found in certain portions of Section 2 of the Fourteenth Amendment. These state:

> " . . . But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." (emphasis added)

The Fourteenth Amendment, in Section 2, then, prescribes a penalty for a state's refusal to allow individuals of twenty-one years of age to vote. An obvious conclusion to be drawn from this penalty based upon the age of twenty-one years is that the states may set forth standards requiring that individual voters attain a certain age so long as the standards do not require an age in excess of twenty-one years. Thus, this recognizes that the state may set voter age qualifications so long as they do not

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restrict enfranchisement to individuals twenty-one years or more.

The Tenth Amendment to the United States Constitution is also of significance to this problem. The state urges that this provision lends support to its argument that the express language, spirit, and intent of the Consittution require that the states be left the prerogative to establish non-discriminatory residency and age requirements for voters. This Constitutional provision is the basis for the Doctrine of Enumeration of Powers and provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus, unless there is a provision existent in the United States Constitution which may be said to authorize Congress to legislate standards effecting residency and age voter requirements in individual states, that power does not exist. The Tenth Amendment evinces an intent on the part of the framers of the Amendment to reserve to the individual states authority over all matters absent a clear enumeration otherwise set forth in the United States Constitution. The state would argue that there is no enumerated power to be found in the United States Constitution which authorizes Congress to legislate as it has done in the case at bar. This argument will be more fully developed in a subsequent portion of the brief.

An additional argument may be made for the proposition that the United States Constitution, its articles and amendments, reflect the theory that voter qualification standards are reserved to the individual states. This may be drawn from the history of the Constitution concerning the expansion of voter rights.

The State of Idaho asserts that the Constitution itself clearly demonstrates that the proper method by which to extend the vote to 18 year olds is by constitutional amendment. This is the sole means by which the basic expansion of voting rights has been accomplished in the past.

Examples of such amendments are found in the Fifteenth Amendment which expressly abolished racial cirteria as being determinative of the right to vote; the Nineteenth Amendment which extended the right to vote to women; and the Twenty-fourth Amendment which eliminated the requirement of a poll tax.

The Fifteenth Amendment is of particular significance insofar as the recognized manner in which the extension of the right to vote has been accomplished in the past. It is worthy of note that this amendment was subsequent to the Fourteenth Amendment and was intended to insure that the blacks would be given the right to vote.

It is apparent from this amendment that it was widely feared that the blacks would be denied the right to vote. However, Congress apparently did not feel it could legislate

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n order to enfranchise the black man. This is certainly clear indication that the Fourteenth Amendment was not onsidered to be a sufficient authorization or enumerated ower upon which to enact such legislation.[3]

Thus, the State asserts that this theory may be xtended to the problem at bar. That is, a constitutional mendment is the proper vehicle by which to provide the 8 year old with the right to vote.

There is a wealth of case law which supports the State of Idaho's contention that voter requirements relating o residency and age are reserved to the individual states. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) denied omen's suffrage absent a constitutional amendment. This ase stated that women did not have the right to vote under he Fourteenth Amendment due to the Constitution of the United States and the laws of the State of Missouri which estricted that right to male citizens. Minor v. Happersett, 62-178. This court states at page 178:

> ". . . No argument as to women's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a state to withhold."

The above provision quite clearly recognizes that the states ave the right to restrict the right to vote if done in a manner which is not violative of other constitutional provisions.

3. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

The decision Pope v. Williams, 193 U.S. 621 (1907) dealt with the right to vote and concluded that the privilege to vote was not granted by the Federal Constitution nor by any of its amendments. Indeed, this decision states that the right to vote is not a privilege springing from United States citizenship. The court in so concluding stated at page 632-633:

> "The privilege to vote in any state is not given by the federal constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162. . . It may not be refused on account of race, color, or previous conditions of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the federal constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor v. Happersett, . . . such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state, so far as the federal constitution is concerned, might provide by its own constitution and laws that none but native born citizens shall be permitted to vote, as the federal constitution does not confer the right of suffrage upon any one, and the conditions under which the right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the federal

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constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Federal Constitution, Art. I, Sec. 2; . . ." (emphasis added)

The state's prerogative insofar as residency requirements are concerned has long been recognized in case law. This has been espoused most recently in the decision, Carrington v. Rash, 380 U.S. 89 (1965). The court in this decision, while invalidating a residency requirement placed upon servicemen for other reasons, recognized that the state had the ultimate power in imposing residency requirements provided they were not discriminatory in nature. The court states at page 632:

"Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. . . There can be no doubt either of the historic function of the state to establish, on a non-discriminatory basis, and in accordance with the constitution, other qualifications for the exercise of the franchise. Indeed, 'the states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised.' Lassiter v. Northampton Election Board, 360 U.S. 45, 50. . . Compare United States v. Classic, 313 U.S. 299; Exparte Yarbrough, 110 U.S. 651. 'In other words, the privilege to vote in the state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' See also Pope v. Williams, 193 U.S. 621 (1907)."

The decision Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), cited in the above quotation, provides an additional statement in support of the right of the individual states to regulate voter qualifications in a reasonable manner. This decision involved the validity and constitutionality of literacy tests. The court stated on page 51:

> "We do not suggest that any standards which a state desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record. . . are obvious examples indicating factors which a state may take into consideration in determining the qualifications of voters . . ." (emphasis ours)

The above quotations certainly express recognition of this state right. Moreover, recent United States Supreme Court decision's striking down state statutory requirements found to be unconstitutional as resulting in invidious discriminations, Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969) and City of Phoenix v. Kolodeziegjski, 399 U.S. 204 (1970) tacitly recognize the state's prerogative insofar as establishment of qualifications as to age and residence conditioning the right to vote, provided such standards did not violate constitutional requirements.

A most significant decision involving the rights of voters, Baker v. Carr, 369 U.S. 186 (1962) contains passages relevant to the problem of the extent of state's rights

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insofar as voter qualifications are concerned. Mr. Justice Douglas stated in concurring with the majority opinion at page 243-244:

> ". . . 'That the states may specify the qualifications for voters is implicit in Article I, Section 2, Clause 1, which provides that 'the House of Representatives shall be chosen by the people and that the Electors (voters) in each State shall have the Qualifications requisite for Electors (voters) of the most numerous Branch of the State Legislature.' ' The same provision, contained in the Seventeenth Amendment, governs the election of Senators."

See also Gray v. Sanders, 372 U.S. 368 (1963).

The above decisional law quite clearly reflects an attitude on the part of this Court that the states may set voter qualifications pertaining to residency and age requirements. These qualifications remain subject to other constitutional guarantees by which the vested right to vote may be protected. Ex parte Yarbrough, 110 U.S. 651 (1884), United States v. Moseley, 238 U.S. 383 (1915); Smith v. Allwright, 321 U.S. 649 (1944). The historical analysis viewed together with the express provisions of the United States Constitution and decisions of this court support the state of Idaho's contention that the individual states may establish voter standards for residency and age requirements.

II.

A STATE MAY ESTABLISH REASONABLE VOTER QUALIFICATION STANDARDS BASED UPON RESIDENCY, AGE AND APPLICABLE TO ABSENTEE VOTING WHICH DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT SO LONG AS THE QUALIFICATION STANDARDS ARE NOT DISCRIMINATORY

The Plaintiff, relying upon a decision, Katzenbach v. Morgan, 384 U.S. 641 (1966), asserts that it does have authorization pursuant to Section 5 of the Fourteenth Amendment to legislate in this area due to denial of equal protection of the laws. Consideration must now be given to this problem in an effort to determine if the Idaho residency requirements and the denial of the vote to individuals between the age of eighteen and twenty-one is, in fact, a denial of equal protection.

The equal protection standard which would appear to be relevant to inquiry at the case at bar is set forth in Reynolds v. Simms, 377 U.S. 533 (1964). This criteria has been expanded by recent decisions which seem to require that there exist not only a rational basis for the distinction, but also a compelling state interest. Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969), City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). While these cases did consider the right of enfranchisement, they did not touch upon the validity of residency nor age voting requirements.

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A. The denial of the right to vote to eighteen year olds is not a denial of equal protection.

The State of Idaho submits that there is a rational basis for denial of the voting privilege to eighteen year olds and that this classification does promote legitimate state interests which are sufficient to justify these restrictions. The following considerations lead to this conclusion.

The age requirement does not distinguish on the basis of race, creed or religion. It is, rather, a rational line of demarcation which has historically served as the basis for enfranchising citizens of the United States. Indeed, a statute which restricts the right to vote to individuals who are twenty-one years of age and older has the effect of denying the right to vote to all individuals who do not meet that certain qualification. This denial is not arbitrarily based on any characteristic other than age. That is, it does not have that fatal defect that was presented before the court in Katzenbach v. Morgan, supra, wherein the literacy test could have discriminated against certain ethnic groups who did not have sufficient knowledge of the English language.

There is, then, a distinct group of individuals in any given state who are classified as not being able to vote, but this classification is not again based upon race, ethnic origin, creed or sex. Moreover, an individual in a given state has the ability and theoretical prospect of reaching the age of twenty-one. Thus, the state asserts that the

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classification of voters on the basis of age is a rational classification.

The compelling state interest is also present in age classification. The individual states have a compelling interest to be able to continue to set forth the standards by which citizens of their state are entitled to vote. This is a vital element of states' rights and must not be relinquished. Consequently, this state right in and of itself constitutes a compelling state interest. The usurpation of this power by National Congress pursuant to legislation is a severe infringement upon this state interest and right. The abrogation of the individual state restriction absent a Constitution Amendment is necessarily harmful to this state interest.

There are additional state interests which bear reference. It is important to this state to maintain an electorate which is sufficiently educated and informed to vote intelligently on candidates and issues. It certainly may be observed that an individual who is twenty-one years of age is generally speaking more mature and capable of making a reasoned choice than an individual eighteen years of age.

The state maintains that the restriction on the right of enfranchisement to those twenty-one years of age and older is a rational classification and serves a compelling state interest. Thus, such a qualification is not a denial of the equal protection required by the Fourteenth Amendment.

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t. The residency and absentee voter requirements found in Idaho statutes and constitutional law do not constitute a denial of equal protection.

The residency and absentee voting qualifications in the State of Idaho are found in Article 6, Section 2 of the Idaho Constitution and Chapter 3, Title 34, Idaho Code. The statutory measures are more fully set forth in the portion of this brief concerning relevant and constitutional statutory provisions. These provisions basically require a certain prescribed minimum period of residency in order to exercise the right to vote. In addition, these provisions set forth standards for non-resident voting.

The Idaho residency requirements relating to duration of residency and the absentee voter provisions do not discriminate against any voter on the basis of race, color, creed or religion. There is no method by which a voter could be disqualified pursuant to this provision provided he resided within the state for the requisite period of time and complied with the absentee voter requirements.

Thus, there is no identifiable group which is sought to be discriminated against by the application of these residency and absentee voting requirements. That is, all individuals are treated equally under the law. Additionally, there is a rational basis for these restrictions which is based upon durational status in the State of Idaho.

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Consequently, there is no invidious discrimination being applied to a distinct section of the population. Carrington v. Rash, supra.

The durational residency and absentee voter requirements found in Idaho law support a compelling state interest. These are: (1) protection against fraud and (2) administration. The State of Idaho has an interest in precluding the dilution of the votes of its citizens for the presidential and vice-presidential officers by the importation of non or fictitious state residents into the state. This interest extends to the dilution of the individual county residents' votes by any such importation from one county into another.

The residency and absentee voting provisions have been regarded as preventing this type of fraud. These residency requirements would, it is submitted, prevent such fraud.

Finally, the State of Idaho has a compelling interest to maintain the residency and absenteeism voting requirements as directly set forth by the Idaho Constitution and the accompanying statutory provisions in that they aid ease of administration. The state asserts that residency and absentee voter requirements for presidential and vice-presidential elections which differ from those pertaining to other state elections would create an efficiency gap in the over all elective process. The standards have been established and apply to the entire voting process within the state. Thus, to require a change in their standards for presidential and vice-presidential elections would require the state to increase the staff necessary to supervise and administer the elections.

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The State of Idaho, then, asserts that the durational residency requirements and absentee voting requirements do not constitute an invidious or irrational discrimination against any group of voters and serve a compelling state interest. Consequently, it is asserted that these voting qualification standards do not constitute a denial of equal protection which is prohibited by the Fourteenth Amendment.

III.

THERE IS NO POWER ENUMERATED IN THE UNITED STATES CONSTITUTION WHICH VESTS IN CONGRESS THE RIGHT TO LEGISLATE IN CONTRAVENTION OF STATE LAWS WHICH PRESCRIBE VOTER QUALIFICATIONS BASED UPON RESIDENCY AND AGE.

The Doctrine of Enumerated Powers has been referred to above and is, as indicated, based upon the Tenth Amendment of the United States Constitution. This doctrine is given further validity by decisional law. Martin v. Hunters Lessee, 4 U.S. (1 Wheat) 304 (1816), initially recognized the doctrine and in referring to the Tenth Amendment stated at page 325:

> ". . . On the other hand, it is perfectly clear that the sovereign powers vested in state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."

See also Carter v. Carter Coal Company, 298 U.S. 238 (1936); Kansas v. Colorado, 206 U.S. 46

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(1907), Givens v. Ogden, 22 U.S. (9 Wheat) 1 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat) 301 (1810). Thus, it is clear that Congress must be able to rely upon a specific enumerated power which authorizes the passage of the legislation in question.

The Plaintiff in its brief seeks to rely upon Section 5 of the Fourteenth Amendment for this enumerated power to enact Titles II & III of the Act. This section provides:

> "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

A determination must now be made whether the legislation in question is appropriate within the meaning of the Fourteenth Amendment. Plaintiff, in support of this legislation, relies upon the Katzenbach v. Morgan, 384 U.S. 642 (1966), a decision upholding a congressional enactment which struck down a certain type of literacy test.

This court in the Morgan decision recognized that Congress could legislate in order to prohibit a state practice that was not in and of itself repugnant to the requirements of the Fourteenth Amendment if the elimination of this practice was necessary to prevent resulting practices which did, in fact, violate the Fourteenth Amendment. Katzenbach v. Morgan at pages 650-653. The court in so doing equated the fifth section of the Fourteenth Amendment with the "necessary and proper clause" of Article 1, Section 8 of the United States Constitution.

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In reaching this conclusion, the court relied upon decisional law construing the "necessary and proper clause" as not requiring Congress to do other than perceive "a basis upon which Congress might resolve a conflict as it did". Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). Thus, the court equated Section 5, with the "necessary and proper clause" insofar as abrogating acts which, although not violative in of themselves of the Fourteenth Amendment, were propagating conditions which were, in fact, violative of that amendment. The court reasoned it could do this and look no further provided ample basis was found in the record of the legislative proceedings for the congressional legislation which was the subject of the Morgan, supra, decision.

The State of Idaho has argued that the state law in issue is not violative of equal protection requirements. Thus, if this argument found in Katzenbach v. Morgan, supra, is to be relied upon as the authority for congressional action pursuant to Section 5 of the Fourteenth Amendment, the congressional record must be searched in an effort to determine if Congress had some rational basis for concluding that Titles II and III of the Act would eliminate action on the part of the state which could result in invidious discrimination based upon race, creed, color or sex.

The state submits that nothing in the Congressional record attendant to the passage of Titles II and III of the

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act would support a finding that the state law sought to be superceded resulted in an invidious discrimination based upon race, color, creed or sex. In fact, the record discloses contrary testimony.[4] Indeed, the record discloses nothing more insofar as the voting age requirement other than the fact that eighteen year olds are required to fight wars, may be tried as adults for crimes, take on the responsibility of marriage and in some states drink liquor.[5]

Thus, the State of Idaho asserts that the rationale of the Katzenbach v. Morgan, supra, decision may not be relied upon to determine that Congress has the power pursuant to Section 5 of the Fourteenth Amendment to so legislate. This, again, is due to the fact that Congress could not have found from testimony in the Congressional proceeding prior to the passage of Titles II and III of the Act that the Idaho law in question resulted in discrimination based on race, sex, color or creed.[6]

The State of Idaho argues that the Congressional Record does not disclose "a basis upon which Congress might resolve a conflict as it did". This court, then, must make this determination as to whether there is an actual denial of equal protection resulting from the Idaho law at issue. To do otherwise would clearly result in a usurpation of the judicial function by Congress. Marbury v. Madison, 5 U.S. 137 (1803). The State of Idaho concludes that

4. 116 Cong. Rec. $3513 (daily ed. March 11, 1970)
5. 116 Cong. Rec. $3057, $3060-63 (daily ed. March 5, 197
6. 116 Cong. Rec., supra.

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there is no finding by Congress and no basis in fact for determining that the Idaho requirements result in a denial of equal protection. Thus, the State maintains that the Morgan, supra, decision does not apply to the case at bar.

The State, then, would argue that the fifth Section of the Fourteenth Amendment may not for the purposes of this legislation, be equated within the "necessary and proper clause" which enables Congress to legislate in certain instances. Consequently, Congress may not rely upon this provision as an "enumerated power" or authorization to so legislate. The legislation, then, does not have constitutional authorization and should be held unconstitutional.

CONCLUSION

Titles II and III of the Voting Rights Act Amendment of 1970 are contrary to the express provisions of the United States Constitution, decisions of this court, and the historical basis upon which this nation was founded. Congress has acted entirely without constitutional authorization and the provisions so enacted must be held unconstitutional.

Respectfully submitted,

Robert M. Robson

ROBERT M. ROBSON
Attorney General
State of Idaho

October, 1970

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PROOF OF SERVICE

I, Robert M. Robson, Attorney General of Idaho, ~~and a member of the Bar of the Supreme Court of the United States~~, hereby certify that on the 10th day of October, 1970 I served the foregoing Brief for the Defendant upon the Plaintiff by depositing a copy in the United States Mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

Robert M. Robson

ROBERT M. ROBSON

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APPENDIX

TITLE II -- SUPPLEMENTAL PROVISIONS

"Application of Prohibition to other states:

"Sec. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4 (a) of this Act are not in effect by reason of determinations made under section 4 (b) of this Act.

" (b) As used in this section, the term 'test or device' means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

"Residence Requirements for Voting

"Sec. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient

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opportunities for absentee registration and absentee balloting in presidential elections--

" (1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

" (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

" (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2 clause 1, of the Constitution;

" (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

" (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

" (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

" (b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

" (c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

" (d) For the purposes of this section, each State

shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

" (e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election (1) in person in the State or political subdivision in which he resided immediately prior to his

removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

" (f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

" (g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

" (h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

" (i) The provisions of section 11 (c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section.

"JUDICIAL RELIEF"

"Sec. 203. Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 201, or (b) undertakes to deny the right to vote in any election in violation of section 202, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of title 28, United States Code, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2282 of title 28 of the United States Code and any appeal shall be to the Supreme Court.

"Penalty"

"Sec. 204. Whoever shall deprive or attempt to deprive any person of any right secured by section 201 or 202 of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

"Separability"

Sec. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder

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of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

"Title III -- REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"Declaration and Findings"

"Sec. 301. (q) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election--

" (1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote--a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

" (2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

" (3) does not bear a reasonable relationship to any compelling State interest.

" (b) In order to secure the consti-

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tutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or older.

"Prohibition"

"Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

"Enforcement"

" Sec. 303. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

" (2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of

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section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

" (b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"Definition"

"Sec. 304. As used in this title the term 'State' includes the District of Columbia.

"Effective Date"

"Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971." (Approved June 22, 1970).

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IN THE

Supreme Court of the United States

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO,

Defendant.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA—AMICUS CURIAE

PRELIMINARY STATEMENT

In August 1970 the United States of America by its Attorney General and Solicitor General caused to be lodged in this Court a Motion for leave to file a Complaint against the State of Idaho seeking to enjoin the State of Idaho from enforcing provisions of its Constitution and statutes which allegedly were contrary to and inconsistent with the Voting Rights Act of 1965. 79 Stat. 437, 42 U.S.C. §§ 1973-1973 (p), as amended by the Voting Rights Act Amendments of 1970, 84 Stat. 314, et seq., Pub. L. 91-285. The above mentioned Motion was subsequently granted, scheduling the filing of briefs by the respective parties and

setting the cause for oral argument on October 19, 1970. In accordance with Rule 42, of the Rules of the United States Supreme Court, the instant Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, is filed, within the time allowed for the filing of the brief of the party supported, defendant State of Idaho.

THE STATUTE INVOLVED AND THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

Under consideration in this litigation as well as the litigation under style of *State of Texas* v. *John N. Mitchell, Attorney General of the United States* (No. 44 Original); *State of Oregon* v. *John N. Mitchell, Attorney General of the United States* (No. 43 Original); and *United States of America* v. *State of Arizona* (No. 46 Original), is the constitutionality of the Voting Rights Act Amendments of 1970, Public Law 91-285. Pertinent to a consideration of the positions taken by the Commonwealth of Virginia in the instant brief *amicus curiae* are the provisions of Title II, § 202 and Title III, §§ 301 and 302 of such Amendments which prescribe:

> "TITLE II—SUPPLEMENTAL PROVISIONS
> "RESIDENCE REQUIREMENTS FOR VOTING
>
> "SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—
>
> "(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;
>
> "(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

"(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or politi-

cal subdivision at the time of such election, if citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by

absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section."

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the Untied States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

The interest of the Commonwealth of Virginia in this litigation arises from the circumstances that both the present Constitution of Virginia (Article II, § 18)[1] and the proposed revision (Article II, § 1), Chapter 763 of the 1970 Acts of Assembly, grant the right to vote only to those qualified citizens who have attained the age of twenty-one (21) years next preceding the election in which they offer to vote. See also § 24-17 of the Code of Virginia (1950), as amended, and § 24.1-41 of the Code of Virginia effective December 1, 1970, and approved by the Attorney General of the United States in accordance with the pro-

[1] The pertinent text of all Constitutional and statutory provisions of the Commonwealth of Virginia to which the Voting Rights Act Amendments are repugnant and antagonistic are set forth in an Appendix hereto in accordance with the provisions of Rule 40 of the Rules of the Supreme Court of the United States.

visions of 42 U.S.C. § 1973(c). The Voting Rights Act Amendments, §§ 301 and 302, have usurped the right of the Commonwealth of Virginia to determine the age qualifications of her voters.

Chapter 462 of the 1970 Acts of the General Assembly of Virginia, recodified Title 24 of the Code of Virginia (1950), as amended; said recodification to become effective December 1, 1970. Title 24.1, Article 7, of the Virginia Code provides *in all elections* for absentee ballots to be cast by, among others:

> "(1) Any duly registered person who will, in the regular and orderly course of his business, profession, or occupation or while on vacation, be absent on the day of election from the county or city in which he is entitled to vote; . . ." (§ 24.1-227.)

Such individuals must apply in person for an absentee ballot not less than five nor more than forty days prior to the election in which the applicant offers to vote and must cast his absentee ballot in person before the general registrar or secretary of the electoral board not less than five days prior to the election in which he offers to vote. See §§ 24.1-227, 24.1-228, 24.1-229, 24.1-232 of the Code of Virginia (1950), as amended. Title II, § 202 of the Voting Rights Act Amendments thwarts the intent of the laws of the Commonwealth of Virginia to provide a more effective and efficient absentee voting practice free from fraud.

The Voting Rights Act Amendments, § 202, is additionally in conflict with durational residency requirements of both the present (Article II, § 18) and proposed Virginia Constitution (Article II, § 1) and registration requirements of both the present (Article II, § 20) and proposed Virginia Constitution (Article II, § 2). (See also §§ 24.1-41, 24.1-47.)

As such the pertinent provisions of the Act of immediate concern, exceed the powers vested in Congress by the Fourteenth Amendment and unconstitutionally deprive the Commonwealth of Virginia of the right to prescribe traditional qualifications—residence requirements, age, absentee registration and ballot provisions—for exercise of the elective franchise, which right is secured to the Commonwealth by the provisions of Article I, § 2, Article II, § 1, and the Tenth and Seventeenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

Congress' reliance upon the Fourteenth Amendment as justification for its actions is ill founded. Such Amendment was deliberately written in terms that do not relate to the aspects of suffrage here under consideration. This was explicitly declared in Congress and has been corroborated by a series of further amendments which have specifically changed the Constitution in every instance of a change in suffrage qualifications—first race, then sex, and lastly poll tax in federal elections. The sovereign power of the States to determine such suffrage qualifications as age and residency has uniformly been recognized by this Court. Such power is recognized in the Constitution as belonging to the States.

Recent decisions have not undermined this doctrine but have merely determined that requirements: must be relevant to the purpose of voter qualifications, *Harper* v. *Va. Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.ed. 2d 169 (1966); *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.ed.2d 647 (1969); *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.ed.2d 583 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); must not invidiously discriminate by barring in perpetuity

otherwise qualified individuals, *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775, 13 L.ed.2d 675 (1965); *Evans* v. *Cornman,* 398 U.S. 419 (1970), and must allow a voter who has cast his ballot to have it fairly counted. *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 506 (1964).

Consequently, the power of Congress is subject to the limitations of the Constitution. The means properly available for the exercise of Congressional power are those consistent with the provisions of the Fifteenth, Nineteenth and Twenty-fourth Amendments and the Fourteenth Amendment, denial of equal protection of the laws, to strike down a requirement so arbitrary, invidious or irrational as to constitute a denial thereof. Conversely, the power of the States in limiting the franchise is subject to the same four provisions. However, age and residency requirements are not arbitrary and invidious nor have notions changed to the stage that age and residency are wholly irrelevant to voter qualifications. Such *type* of restrictions do, therefore, meet the "compelling interest standards" laid down by this Court.

Since the general type of restriction imposed is not violative of the Fourteenth Amendment, Congress cannot strike it down. Whether the particular statutory means employed to enforce the general type of restrictions is as efficient as any alternative, [i.e., age twenty-one (21) rather than age eighteen or age seventeen; one year residency rather than six months or thirty days] is a matter solely within the determinative power of the States, subject only to the limitation that it is void if shown to be "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." Twenty-one years of age rather than eighteen years; one year's residency rather than six months', cannot be said to be arbitrary.

Since age and residency requirements are left within the power of the States and are neither arbitrary nor invidious,

the action of Congress is not appropriate, is not "consistent with the letter and spirit of the Constitution" and is thus unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat 1, 22 U.S. 1, 6 L.ed. 23; *McCullough* v. *Maryland*, 4 Wheat 316, 17 U.S. 316, 4 L.ed. 579.

ARGUMENT

The Voting Rights Act Amendments Of 1970 Are Unconstitutional

As Mr. Justice Harlan made clear in his address dedicating the Bill of Rights Room in New York City on August 9, 1964, the framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have*. And they determined that in a *government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied.)

Further when one remembers—as this Court pointed out in *United States* v. *Cruikshank*, 92 U.S. 542, 551, 23 L.Ed. 588 (1876)—that:

> " 'The government of the United States is one of delegated powers alone, its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States.' "

it necessarily follows that Congress has no power to suspend the voting qualifications—with respect to age, residency,

and the manner of casting a ballot—unless that power is conferred upon Congress by the Fourteenth Amendment.[2] That such authority is conferred upon Congress by the Fourteenth Amendment is emphatically denied.

Article I, Section 2,[3] Article II, Section 1[4] of the Constitution of the United States and the Seventeenth Amendment[5] provide that the States should set the requisite qualifications of electors for the House of Representatives, President and Vice President and Senate respectively, while the Tenth Amendment[6] reserves to the States all powers not conferred upon the Federal government.

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[2] "The question of the appropriate powers conferred upon Congress by the Fifteenth Amendment does not arise in the present brief. The United States relies upon the Fifteenth Amendment only as justification for the enactment of Title II, Section 201 which is a nationwide suspension of literacy tests. Since Virginia presently has no literacy test, the same being suspended by the 1965 Voting Rights Act, the question of their validity is not deemed relevant for the Commonwealth's purposes. The United States relies upon the powers invested by the Fourteenth Amendment in justifying the validity of the age, residency, and absentee registration and balloting provisions of §§ 202, 301 and 302, which of course are of material concern to the Commonwealth."

[3] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[4] "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

[5] "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

A review conclusively establishes that the right to prescribe the qualifications of electors is one constitutionally vested exclusively within the province of the individual states, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment[7]), sex (Nineteenth Amendment[8]) and the payment of a poll tax in federal elections (Twenty-Fourth Amendment)[9] and invidious discriminations (Fourteenth Amendment).

(A)

THE FOURTEENTH AMENDMENT

While this Court has decided numerous recent cases in the general area of suffrage and elections, these have dealt with the effect to be given ballots cast by voters who were admittedly qualified (e.g., the reapportionment cases); the striking down of invidious discriminations, some having no relation to voter qualifications (e.g., poll tax *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.ed.2d 169 (1966) and more recently this Court's decision in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.ed.2d 647 (1969) and others absolutely prohibiting individuals, satisfying all general requirements from ever being permitted to qualify as voters

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[7] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—"

[8] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

[9] "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

(e.g., Texas residency requirement in *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.ed.2d 675 (1965); see also *Evans* v. *Cornman*, 398 U.S. 419.)

Under these circumstances, we submit that the legislative history of the Fourteenth Amendment merits painstaking consideration. For we are considering here not requirements that were at one time related to voter qualification, the modern notions of which have changed, *Harper* v. *Virginia State Board of Elections, supra,* nor requirements which will forever bar an individual from the opportunity of participation in an electoral process; but under consideration are issues which have traditionally and still today do directly affect voter qualifications generally required of States' citizens, which qualifications are conceded to be, and which this Court has emphasized are, legitimate matters of State concern—residency and age. See, *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.ed.2d 1072 (1959); *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.ed.2d 583 (1969).

An appeal to history is especially appropriate in the instant case when so vast and revolutionary a power is asserted by Congress as that contained in the Voting Rights Act Amendments, with no suggestion of constitutional warrant for such action other than a reliance upon one case; *Katzenbach* v. *Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed.2d 828 (1966).

Perhaps notions of what constitutes equal protection do change. *Harper* v. *Virginia Board of Elections, supra.* This Court in 1966 struck down Virginia's poll tax as a prerequisite for voting, though historically such a requirement was a common qualification. However, both historically and presently age and residency are considered valid requirements having a direct relation to voter qualifications. Such qualifi-

cations being recognized as valid today, it becomes even more appropos to determine how such requirements were treated by the Framers of the Constitution and its Amendments. See, *Adamson* v. *California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.ed. 1903 (1947); *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.ed. 511 (1956); *Bell* v. *Maryland,* 378 U.S. 226, 84 S.Ct. 1814, 12 L.ed.2d 822 (1964). In the *Adamson* case Mr. Justice Black pointed out:

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex Parte Bain, 121 U.S. 1, 12, 30 L.ed. 849, 853, 7 S.Ct. 781, that 'it is never to be forgotten that in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.'"

Moreover, in the *Ullmann* case Mr. Justice Frankfurter speaking for the Court declared "nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." Finally, Mr Justice Goldberg, in the case of *Bell* v. *Maryland, supra,* approached consideration of that situation with the following admonition:

> "Of course, our constitutional duty is 'to construe not to rewrite or amend the Constitution.' Post, page 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the framers. We must, therefore, consider the history and circumstances indicating what the Civil War amendments were in fact designed to achieve."

Though accusations of vagueness have been applied to the Fourteenth Amendment it is conspicuously clear that

suffrage requirements were explicitly disavowed by the framers as being beyond the purpose or reach of the Fourteenth Amendment. Being so, it is not possible to now reach the qualifications under attack (which are inherently in the States' powers) except by amending the Constitution.

The proceedings in Congress are quite illuminating. Shortly after the passage of the Civil Rights Bill in 1866 Congress turned its attention to various proposals for constitutional amendments intending to implement the congressional plan of reconstruction for the South and which ultimately became the Fourteenth Amendment. Representation in the House of Representatives occupied the minds of many of the members and thus qualifications for voting were discussed. Congressman George F. Miller, a Pennsylvania Republican, alluded to the fact that "there can be no doubt that under the Constitution each State has the right to regulate the qualifications of its own electors, and Congress has no right to assume the authority." 39 Cong. First Sess. 2089 (hereinafter cited as "Globe"). Congressman Thaddeus Stephens, Republican leader of the House of Representatives, and member of the Joint Committee of Fifteen on Reconstruction, opened the debate on the proposed Fourteenth Amendment by saying:

> "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several states are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal states could be induced to ratify any proposition more stringent than this." 39(1) Globe 2459.

However, he went on to state that he considered the second section the most important in the Article and it was hoped

that this section would tend to bring about universal suffrage. As he immediately stated:

> "If any State should exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effection of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national government, both legislative and executive." Id.

President James A. Garfield, then the Republican Congressman from Ohio, spoke in favor of the proposed amendment and stated:

> "Sir, I believe that the right to vote, if it be not indeed one of the natural rights of all men, is so necessary to the protection of their natural rights as to be indispensable, and therefore equal to natural rights.... And I profoundly regret that we have not been enabled to write and engrave it upon our institutions, and embed it in the imperishable bulwarks of the Constitution as a part of the fundamental law of the land." 39(1) Globe 2462.

Congressman Miller concurred in the views of the House that suffrage was not included in the Fourteenth Amendment but he emphasized the importance of the second section stating:

> "Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation from male citizens not less than twenty-one years of age, white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have

representation for all of its male citizens not less than twenty-one years of age." 39(1) Globe 2510.

In closing debates on the Fourteenth Amendment Representative Bingham, "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California, supra,* 332 U.S. 46, 74 (1947) noted that:

> "The exercise of the elective franchise, though it be one of the privileges of a citizen of the republic, is exclusively under the control of the state."

Moreover, in speaking specifically of the first section Bingham declared:

> "Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny any free man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the republic, although many of them have assumed and exercised the power and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.
>
> "The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . . ." 39(1) Globe 2542.

After a protest by Stephens of the leniency of the amendment, the House then passed the measure. Id. at 2544, 2545. See also, 16 N.Y.U. Law Quarterly, Truth and Fiction—Fourteenth Amendment, page 35 (1938-1939).

In opening the debate of the Fourteenth Amendment in the Senate, Senator Jacob M. Howard, a Michigan Republican and member of the Joint Committee on Reconstruction, introduced the measure in the absence of the Committee

Chairman, Senator William P. Fessenden of Maine, declaring:

> "But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." 39(1) Globe 2766.

Addressing himself to the second section of the amendment he continued:

> "It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several states at all; nor does it recognize, much less secure, the right ....
>
> "The second section leaves the right to regulate the elective franchise still with the states, and does not meddle with that right." Ibid.

At a later point during the debate Senator Howard declared:

> "We know very well that the states retain the power, which they have always possessed, of regulating the right of suffrage in the states. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people for Legislatures of the State and not to assume to regulate it by any clause of the Constitution of the United States." 39(1) Globe 3039.

Again debate in the Senate proceeded as it had in the House with every member understanding that the amendment was not to affect in any way the States' powers to prescribe qualifications for exercise of their right to vote.

The Fourteenth Amendment was not enacted in naivety. The Senate and House were both fully aware that many states denied suffrage to illiterate, nonresident, nontaxpayers, paupers and the like. But denial of suffrage to such persons was to be covered by the second section of the amendment; no one suggested that the first section would render such laws invalid. The following colloquy between Senator Howard and Senator Daniel Clark, a New Hampshire Republican, is illustrative:

> "MR. CLARK: . . . I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> "MR. HOWARD: Certainly it does, no matter what may be the occasion of the restriction. . . . If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [Mr. Sumner] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion. The principle applies to every one of the States in precisely the same manner. And sir, the true basis of representation is the whole population. It is not property, it is not education,

> for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided." 39(1) Globe 2767.

The last word on suffrage before the final vote in the Senate was taken was by Senator Howard who reiterated his former position that the whole system of suffrage rests with the individual states. 39(1) Globe 3039. The Senate then passed a slightly modified version of the Fourteenth Amendment. 39(1) Globe 3042. And after Congressman Stephens' last speech in favor of the amendment, expressing his general disappointment that Congress did not assume more control with regard to suffrage, the House passed the Fourteenth Amendment and sent it to the country. 39(1) Globe 3434, 3438.

All of the foregoing were public statements made and distributed throughout the country and supplied the basis for actions by the individual States in the ratification of the amendment. It is shown without question that Section One was not intended to limit in any manner or degree the power of the states to determine electoral qualifications or disqualifications. The only limitation was that of Section two, which does not prohibit the states from denying the franchise but indeed contemplates such a denial and provides a specific penalty in that event.

Shortly after the adoption of the Fourteenth Amendment, Congress took the additional step not previously thought feasible, and in 1869 the Fifteenth Amendment was proposed. It is axiomatic that the only reason for the Fifteenth Amendment was to modify the Fourteenth Amendment, to prohibit, rather than to permit, voter re-

strictions on specified grounds. By so doing it also made inoperative, to this extent, the deterrent provision in Section Two of the Fourteenth Amendment, since the prohibition made the penalty needless. The adoption of the Fifteenth, we submit, was a constitutional reiteration that the Fourteenth Amendment contained no restriction on suffrage qualifications in any respect.

Every attempt to apply federal power to the determination of the qualification to voters, a subject otherwise consistently left to the sovereign powers of the several states, has been by specific constitutional amendment. The adoption of the Nineteenth Amendment and the Twenty-fourth Amendment is corroboration by Congress and also the States, which ratified such amendments, that the Fourteenth Amendment never conferred any guarantee of voter qualification. We have this law in an established straightforward manner of repeated amendments of similar tenor establishing a canon of constitutional construction that corroborates the plain meaning of the Fourteenth Amendment proclaimed alike by its words and its history.

We do not deal here in the case at bar with the dilution of ballots cast by qualified voters; nor with requirements totally unrelated to voter qualifications nor with restrictions forever barring an otherwise qualified individual from voting. We deal only with the determination of recognized qualifications for voting in State and local elections. Qualifications which the Court has stated and restated are the primary responsibility of the States. We submit that such qualifications are left by the original Constitution and all of its amendments to the exclusive and final choice of the respective States. If a change be desired the procedure of amendment is indicated. This was clearly the view of Congress in proposing the Twenty-fourth Amendment;

"Since Congress is not given the power by the Constitution to regulate either voting qualifications or the manner of election of presidential electors, their inclusion in the amendment requires the constitutional amendment approach." H.R. Rep. No. 1821, 87th Cong. 2d Sess. 5 (1962).

(B)

JUDICIAL DECISIONS

At the outset it is imperative to be cognizant that the intrusions of Congress are in the areas of age and residency. Such requirements are strictly within the power of the States to impose. This precept has been reiterated time and time again by this Court. See, *Guinn* v. *United States,* 238 U.S. 347, 362, 35 S.Ct. 926, 59 L.ed 1340 (1915); *Pope* v. *Williams,* 193 U.S. 621, 632, 24 S.Ct. 573, 48 L.ed. 817 (1904); *Carrington* v. *Rash, supra; Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 51 (1959); and most recently *Kramer* v. *Union Free School District, supra.* See also, *Davis* v. *Beason,* 133 U.S. 333, 345-347, 10 S.Ct. 299, 33 L.ed. 637 (1890); *Dreuding* v. *Devlin,* 380 U.S. 125, 85 S.Ct. 807, 13 L.ed.2d 792 (1965); *McPherson* v. *Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.ed. 869 (1892). Cases previously decided by this Court concern themselves only with the validity of *additional* requirements other than those conceded that the State has the power to impose.

Kramer v. *Union Free School District, supra,* concerns the *additional* requirement of a New York statute that individuals otherwise eligible to vote must in certain school district elections either (1) own or lease taxable real property in the district, or (2) be parents or custodians of children enrolled in a local public school. The Court held that since the New York law permitted inclusion of many

persons having only a remote and indirect interest in school affairs while excluding others having a distinct and direct interest, the proposed objective of the statute was not being met. Consequently the section violated the equal protection clause of the Fourteenth Amendment. *Cipriano* v. *City of Houma, supra,* concerned an attack on a Louisiana statute which limited franchise of special elections, for the issuance of municipal utility revenue bond, to property taxpayers. The *additional* requirement was struck down by the Court as being violative of the equal protection clause of the Fourteenth Amendment since it involved a voting classification wholly irrelevant to achievement of the States' objective.

Again in the latest case of *City of Phoenix, et al.* v. *Kolodziejski,* 399 U.S. 204, this Court, acting pursuant to the equal protection clause, prohibited the State of Arizona from restricting the franchise to real property taxpayers in elections to approve the issuance of general obligation bonds, since the differences between the interests of property owners and non-property owners, *otherwise qualified,* were not sufficiently substantial to justify excluding the latter from voting.

Also easily distinguishable, as previously mentioned in this brief, are the cases of *Carrington* v. *Rash, supra,* and *Evans* v. *Cornman, supra. Carrington* v. *Rash* was an instance of invidious discrimination between persons satisfying all the general requirements of residency, some of whom were permitted to qualify as voters while others were absolutely prevented from doing so. In that case a sergeant in the United States Army, originally from Alabama but on duty in New Mexico, bought a house and established a family and business in Texas with the admitted intention of residing there permanently. "But for his uniform" Texas conceded his eligibility to vote. But Texas stated that no

serviceman may ever acquire a voting residence in the State so long as he remains in service. This Court held such an *additional* requirement contrary to the equal protection clause as a *permanent prohibition* against all servicemen as a class though otherwise complying with all resident requirements. The case in short did not establish any qualification requirement with which prospective voters could comply by reasonable effort but imposed a permanent disqualification on servicemen whatever their circumstances or efforts may be. Likewise, *Evans* v. *Cornman* concerned a Maryland statute prohibiting in perpetuity *otherwise qualified residents* from participating in elections merely because they resided on a federal enclave. This restriction was also struck down as violative of the equal protection law.

Harper v. *Virginia State Board of Elections, supra,* like this Court's rulings discussed above in *Kramer, Cipriano,* and *Kolodziejski,* struck down an *additional* requirement which "burdened or conditioned" the fundamental right of voting and which was found to have no relation to voter qualifications—the poll tax.

Similarly the reapportionment cases, such as *Reynolds* v. *Sims, supra,* require that an individual's ballots once cast, be entitled to equal weight thus ensuring "the opportunity for equal participation by all voters in the election of state legislators." If a person is qualified to vote, his vote may not be diluted so as to have no proper effect. See also *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Gray* v *Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.ed.2d 821 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964). None of these cases touches on the question of the power of the States to determine qualifications for voting.

Likewise while all cases mentioned concerned statutes denying the franchise to citizens *otherwise qualified by*

residence and age, none touched upon the power of the States "to impose reasonable . . . age and residency requirements on the availability of the ballot." *Kramer* v. *Union Free School Dist., supra.*

While it may be arguable whether the Framers intended the Fourteenth Amendment to govern the weighing of votes after they have been cast, or the imposition of various requirements upon already qualified voters, it is certainly clear that they did *not* intend to restrict the power of the States to determine suffrage qualifications, which had been their unquestioned prerogative since before the original Constitution was adopted.

The trend of decisions of this Court has shown a cognizance of this intent. Congress' attempt to blatantly overlook the Constitution as written and construed must be rejected.

(C)

The Tests

The Brief for the United States is conspicuously void in any mention that it is the States which are to determine the qualifications of voters, not Congress. Article I, § 2, Article II, § 1, Article I, § 4, prior to the Seventeenth Amendment and the Seventeenth Amendment itself provide that it is the States who are to determine the qualifications of electors.

There has been no Amendment of the Constitution which has conferred the right to vote on anyone. The Amendments (Fourteenth, Fifteenth, Nineteenth and Twenty-fourth) are negative in character only and merely declare that certain things *cannot* be considered by the States in prescribing qualifications for electors. This is true whether the qualifi-

cations are for State, Congressional or Presidential elections.

The right of the States to set the qualifications for its electors has been recognized by this Court time and time again.

In *Newberry* v. *United States,* 256 U.S. 232, 248, 65 L.ed. 913 (1921), this Court held prior to the Seventeenth Amendment, that Article I, § 4, defined the sole authority of Congress over elections for Congress and the Senate. It was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' "

Insofar as the *Newberry* case held federal law inapplicable to primaries, it undoubtedly has been superseded by *United States* v. *Classic,* 313 U.S. 299, 85 L.ed. 1368 (1941), but the principle just enunciated was not affected.

Similarly, in *United States* v. *Cruikshank, supra,* 592, it was held:

> "In Minor v. Happersett, 21 Wall. 178 (88 U.S., XXII, 631), we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In U.S. v. Reese just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of

the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In *Guinn* v. *United States,* 238 U.S. 347, 362, 59 L.Ed. 1340 (1915), the Oklahoma "Grandfather Clause" was declared unconstitutional, which in effect imposed literacy tests in a discriminatory manner. The Court was clear to point out, however, that neither the Fourteenth nor Fifteenth Amendments had affected the power of the states to prescribe qualifications not dependent upon race. It was said:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

"Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both."

The effect of the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments is well stated in an article entitled "Voting Rights", 3 Race Rel. L. R. 371, 372 (1958), viz.:

> "The effect of these constitutional provisions, however, is not to confer on any person a federal right to vote. The state, not the federal government, is still primarily responsible for voting rights; but once the state purports to give any person or class the elective franchise, the federal constitutional and statutory provisions immediately and automatically operate to limit the power of the state to determine whether it will withhold the franchise from any person or group of persons. Thus, upon the adoption of the Nineteenth Amendment, all state constitutional and statutory provisions withholding the elective franchise from women solely because of their sex were immediately null and void. See People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N.E. 145 (1931); Annot., 71 A.L.R. 1332 (1931). It would seem, therefore, that the states are free to establish any requirement they may deem wise, as long as these requirements are not discriminatory nor based on sex, race, color or previous condition of servitude. As a consequence, voting rights may, and often do, vary widely from state to state."

This settled constitutional right for such variances may not now be abrogated by a "test," discussed infra, dogmatically applied.

(1)

Age and Residency

As the brief for the United States points out (p. 39) the action of Congress is based allegedly upon their power to enforce the Equal Protection Clause by a determination that the States lack a compelling interest in particular qualifications regarding insofar as pertinent here, age and

residency. The brief of Plaintiff, thus relies upon the "perceivable basis" test of *Katzenbach* v. *Morgan, supra,* the "compelling interest standard" of *Kramer* v. *Union Free School District, supra,* and rejects the test that residency requirements are permissible unless so unreasonable to amount to irrational or unreasonable discrimination. *Dreuding* v. *Devlin, supra.*

The attempt to support Congress' action by the *Katzenbach* "perceivable basis" test while at the same time putting the unwarranted burden upon the States of demonstrating a "compelling interest" ignores all other provisions of the Constitution and is itself unwarranted since there is absent any showing of a denial of equal protection.

As shown, the "letter and spirit" of the Constitution reserve to the States the right to set qualifications for its electors. To allow Congress to apply the "perceivable basis" test in a mere *ipse dixit* fashion would violate that "letter and spirit." "[S]ome appraisal of reasonableness is implicit in the requirement that there be a 'basis' for Congress' judgment." The *Supreme Court, 1965 Term,* 80:91 Harv. L. Rev. 171 n.10 (1966).

There has been no showing of any reason or justification for the intrusions of the 1970 Voting Rights Act Amendments nor can it be argued that such action of Congress is reasonable because of the lack of the States to show a compelling interest in the various qualifications under attack.

It is conceded in the Brief of the United States (pp. 34-35) that each and every State has a primary responsibility for setting voter qualifications and that in making the classifications required by such responsibility, there is a "compelling interest" in terms of the review standard in limiting the franchise to those classes which will vote responsibly and honestly. (See also concession in fn. 24 of Govern-

ment's brief p. 35.) "The standard qualifications of citizenship, age, and residency, . . . directly respond to these [compelling] interests" (Government's brief p. 35). Such qualifications and the interests arising from them are equally applicable in all elections, including Presidential elections. (See Government's brief p. 51, fn. 51.) Age and residency are inherently related to voter qualifications. They per se meet the "compelling interest" standard.

If, however, the States must show a "compelling interest" not only for the *type* of qualifications (i.e., age and residency) but also for the statutory method of carrying out such qualifications (i.e., age twenty-one rather than age eighteen; one year's residency rather than six months or thirty days), it cannot be done.

Recognizing this impossibility, this Court has never applied the compelling interest standard to various specific age and residency requirements. It has applied the standard only to "the *additional* requirements . . . which prohibit some . . . residents who are *otherwise qualified by age and citizenship* from participating in . . . elections. . . ." The standard is applicable only "to statutes denying the franchise to citizens who are *otherwise qualified by residence and age*. . . . [I]f a challenged State statute grants the right to vote to some bona fide residents *of requisite age* and citizenship and denies the franchise to others [also of requisite age and citizenship] the Court must determine whether the exclusions are necessary to promote a compelling State interest." *Kramer* v. *Union Free School District, supra.* (Emphasis supplied.)

Logically it is very easy to distinguish between the general requirements of age and residency and the additional requirements which this Court has repeatedly struck down. Age and residency do have a relation to voter qualification

and do promote the State's interest involved. The additional restrictions (e.g., payment of property or poll taxes) have been found to have no relation to voter qualification and wholly irrelevant to achievement of the State's objective.

One is understandably apprehensive of the burden which the "compelling interest" standard would place upon a State to justifiy a specific statutory implementation of a concededly valid general type of restriction. For example, it is a valid requirement to establish a minimum voting age and necessity thereof is justified. Common sense dictates the need for some minimum age. But to justify a minimum age of twenty-one and show that exclusion of those who are twenty, nineteen, or eighteen years of age is necessary to promote a compelling State interest is much more difficult and, it is submitted, impossible. To ask whether it is necessary to exclude those below twenty-one or those residing less than a year and then to decide that the statutory implementation of such exclusions are invalid because some of such individuals can be shown to be responsible, makes all franchise requirements vulnerable. Almost any classification will exclude some who do not fit within the reasons for exclusion.

It is suggested that in view of the rights of the States to set voter qualifications, in view of the fact that the history of the Fourteenth Amendment demonstrates the general suffrage requirements here under consideration have been left to the States, and in view of this Court's decisions construing the equal protection clause, the following proposed standard as outlined in "Limitations on the Voting Franchise, etc.," 143 Utah L. Rev. 150 (1970), is applicable:

> Rather than determining whether it is necessary to exclude [a specific individual] in order to promote responsible voting, the Court should apply the compelling

> interest standard to the type of restriction imposed and then ask whether the particular statutory means employed accomplishes the purpose behind the restriction as accurately and efficiently as any alternative means. If it does not, then the statutory requirement would be unnecessary to achieve that purpose.
>
> * * *
>
> The suggested analysis of any franchise restriction in terms of the compelling interest standard begins with the assumption that the franchise must be limited to maintain responsible elections. The court then should determine whether the particular type of restriction is necessary to promote this end and, finally, whether the particular classification is as fair and efficient as any other available method.

"The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch* v. *River Port Pilot Commissioners,* 330 U.S. 552, 556, 91 L.ed. 1093, 67 S.Ct. 910 (1947). This is especially true with respect to a formula such as, in the case at bar, the compelling interest standard, the application of which has been shown to be beyond the "letter and spirit" of the Constitution.

Since States have a general constitutional competence to act in the area of voter qualifications and since an automatic formula would in essence allow wholesale invalidation of state laws under the Equal Protection Clause, it is submitted that distinctions drawn (between eighteen years and twenty-one years of age; between one year's residency and six months or thirty days) are valid as long as these distinctions are not "irrational," "arbitrary," "irrelevant," "unreasonable," or "invidious."

Twenty-one years of age does bear a direct relationship to responsibility and intelligence in voters; since the various

specific residency, as well as registration and absentee ballot provisions (to be discussed *infra*) do bear a direct relation to an honest and responsible election, and more importantly since such provisions apply equally to all individuals, it is a reasonable means of limiting the franchise. It is difficult to say that age twenty-one as compared to age twenty, age nineteen, age eighteen, is "irrational" or "arbitrary." It is difficult to say that one year's residency as compared to nine months, six months, three months, one month, is "irrational" or "arbitrary." In such situations the necessary relationship of the compelling interest standard must yield. The specific statutory requirement must stand. *Dreuding* v. *Devlin, supra.*

Often a legislature must choose between equally reasonable requirements and to demand that a State later prove the necessity of the particular choice would unnecessarily restrict the legislative process. It is no answer to say that Congress has spoken and made the choice, for as demonstrated *supra,* the choice is one for the States, subject only to the requirement that the choice made, be not violative of the equal protection clause. Equal protection cannot demand more of any particular requirement than that it be as fair as any other in achieving the State's interest. Age twenty-one rather than age eighteen; one year's residency rather than six months, or thirty days, is as fair as any other line to be drawn. Such requirements cannot be said to be arbitrary. If the line is to be redrawn it must be left to the respective State legislatures, similar to Virginia's whose newly proposed Constitution will require a six months' residency requirement instead of one year and allow alternatives for residency requirements in Presidential elections.

The true test must be the application of the letter and spirit of the Constitution, not the test of an inventive standard dogmatically applied.

(2)

Absentee Registration and Balloting

Both the present Constitution of Virginia, (Art. II § 20) and the proposed revision (Art. II § 2) require that all applications to register, by individuals meeting the requirements of age and residency "shall be completed in person before the registrar." See also § 24.1-47 of the Code of Virginia (1950) as amended, recently approved by the Attorney General of the United States which directs that only those "who shall apply in person to be registered . . . and who, at the time of the next general election, shall have the qualifications of age and residence required by the Constitution of Virginia" shall be registered. The only exception to such requirement is made in the case of members of the armed forces of the United States while in active service. Such individuals shall not "be required . . . to register as a prerequisite to the right to vote in any and all elections, including legalized primary elections" (Art. XVII § 1 of the Virginia Constitution). A similar provision for registration by absentee application, for servicemen, is continued in the proposed Constitution. (Art. IV Sec. 4)

However, Section 202 of the Voting Rights Act Amendment purports to grant a right of absentee registration to *all state citizens,* in Presidential elections.

The absentee ballot provisions of Virginia recently adopted and also approved by the Attorney General of the United States require, similar to registration provisions, that any otherwise qualified individual who will be absent on the day of election due to business, profession, or occupation, or due to vacation must cast his ballot in person before the general registrar or secretary of the local electoral board not less than five days prior to the election in

which he offers to vote. See §§ 24.1-227, 24.1-228, 24.1-229 and 24.1-232 of the Code of Virginia (1950) as amended. Section 202 of the Act has no such requirements and provides that an absentee ballot may be returned at any time before the closing of the polls on the day of election.

It is submitted that such requirements as registration in person or the casting of an absentee ballot in the manner prescribed by Virginia law are not *additional* requirements which this Court has previously struck down. Such requirements are procedural in nature only and do *not* contain any substantive qualification which one must meet prior to being entitled to vote.

However, if this Court is to conclude that such requirements are *additional* within the meaning of *Kramer* and consequently the doctrine of "compelling interest" is to be utilized, then there is no question that the Commonwealth of Virginia has such an interest in the implementation of procedures that will insure responsible and honest voting.

In two recent instances, and two separate elections, Citizens of Virginia have been convicted in Federal Courts in the Commonwealth of violations of election laws in the casting of fraudulent absentee ballots. *United States* v. *Weston,* 417 F.2d 181 (4th Cir. 1969), cert. den. 396 U.S. 1062 (1970); *Fields* v. *United States,* 228 F.2d 544 (4th Cir. 1955), cert. den. 350 U.S. 982, 100 L.ed. 850, 76 S.Ct. 468 (1956). Because of these occurrences, the concern they created, and the lack of effectiveness of criminal sanctions, the General Assembly of Virginia rightly felt that it was compelled to take measures that would more effectively secure absentee registration and balloting in order to prevent future violations of election processes. It, therefore, enacted the sanctions relative to absentee balloting and the method of registration previously discussed.

The Commonwealth is not asserting that it has a compelling interest in voting procedures due to the administrative tasks that may be involved. (See Plaintiff's brief, p. 59) Nor on the other hand can the United States argue that we are concerned here only with presidential elections, an especially federal event. An individual registers only once in the Commonwealth. Once registered he is entitled to vote in every ensuing local, State, Congressional, or Presidential election; to allow an individual to register affects not just "federal events."

What the Commonwealth does assert is that it has an "interest" in every election, due to far more than a possible administrativve burden; due to her obligation to ensure honest elections, by the casting of honest ballots of duly qualified citizenry.

The right to an honest ballot is as important as the franchise itself. Without honest balloting the right of franchise is meaningless. As stated in *Prichard* v. *United States*, 181 F.2d 326, 331 (6th Cir. 1950):

> "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest count is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him. . . ."

If the "compelling interest" doctrine is extended to the case at bar, the Commonwealth of Virginia has met the standard: (1) The facts and circumstances uncontrovertibly illustrate the need for tighter ballot security; (2) The interests sought to be protected are those of all qualified citizens, including the absentee voter himself. A compelling

interest in an efficient and effective voting practice free from fraud, is thereby shown. It cannot be thwarted by Section 202.

CONCLUSION

The actions and powers of Congress are subject to the classic utterances of Chief Justice John Marshall in the historic cases of *Gibbons* v. *Ogden,* 9 Wheat. 1, and *McCullough* v. *Maryland,* (4 Wheat. 316):

> "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*" (9 Wheat. 196).
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> * * *
>
> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution,* are constitutional." (4 Wheat. 421).

As we have seen, the power of Congress to deal with State prescribed voter qualifications is severely limited by the Constitution. To require the States to justify their actions (actions which have been left within the inherent power of the States) by the application of a compelling interest standard would be inconsistent with the letter and spirit of the Constitution. The power of the States to prescribe voter qualifications is original and independent, not derivative or subordinate.

Such power is not granted to the States by any law, but remains with the States where it has existed since the formation of the Union, and it has never been lodged elsewhere. It cannot now be usurped by the dogmatic application of a standard impossible for the States to meet, nor by allegedly

"appropriate" legislation of Congress passed without any constitutional warrant.

The statutes of the Commonwealth of Virginia are not violative of Fourteenth Amendment precepts. Congress' unprecedented assertion of authority over such qualifications as age, residency and absentee registration and voting procedures, should not receive the sanction of this Court and should be declared unconstitutional and void.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Assistant Attorney General

WALTER A. MCFARLANE
Assistant Attorney General

Supreme Court–Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Andrew P. Miller, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia, as amicus curiae, in the above captioned matter, hereby certify that three (3) copies of this Brief on Behalf of the Commonwealth of Virginia Amicus Curiae have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid (airmail postage prepaid to defendant State of Idaho), this the 12th day of October,

1970, pursuant to the provisions of Rule 33 of the Rules of the United States Supreme Court as follows:

Honorable Robert M. Robson, Attorney General of Idaho, Office of the Attorney General, Capitol Building, Boise, Idaho 83702, counsel for defendant State of Idaho;

Honorable John N. Mitchell, Attorney General of the United States, Honorable Erwin N. Griswold, Solicitor General of the United States, and Honorable Jerris Leonard, Assistant Attorney General of the United States, Department of Justice, Washington, D.C. 20530, counsel of record for plaintiff United States of America.

ANDREW P. MILLER
Attorney General of Virginia

Constitution of Virginia, Vol. 9, Code of Virginia (1950), as amended, p. 509

"ARTICLE II.

"ELECTIVE FRANCHISE AND QUALIFICATION FOR OFFICE.

"§ 18. *Qualification of voters.*—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved until the expiration of thirty days after such removal.

"The right of citizens to vote shall not be denied or abridged on account of sex."

Constitution of Virginia, Vol. 9, Code of Virginia (1950), as amended, pp. 510, 511

"§ 20. *Who may register.*—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

"First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid

one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; and,

"Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and,

"Third. That he answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the registration officer, which questions, and his answers thereto, shall be reduced to writing, certified by the said officer, and preserved as a part of his official records."

Proposed Revision of the Constitution of Virginia, 1970 Acts of Assembly, Chapter 763, p. 1598

ARTICLE II

Franchise and Officers

Section 1. Qualifications of voters.

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be twenty-one years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. As prescribed by law, no person adjudicated to be mentally incompetent shall be

qualified to vote until his competency has been reestablished.

The residence requirements shall be that each voter shall have been a resident of the Commonwealth for six months and of the precinct where he votes for thirty days. A person who is qualified to vote except for having moved his residence from one precinct to another fewer than thirty days prior to an election may in any such election vote in the precinct from which he has moved. Residence, for all purposes of qualification to vote, requires both domicile and a place of abode. The General Assembly may provide, in elections for President and Vice-President of the United States, a residence requirement of less than six months and alternatives to registration for new residents of the Commonwealth.

Any person who will be qualified with respect to age to vote at the next general election shall be permitted to register in advance and also to vote in any intervening primary or special election.

Section 2. Registration of voters.

The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. Registrations accomplished prior to the effective date of this section shall be effective hereunder. The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used.

Applications to register shall require the applicant to provide under oath the following information on a standard form: full name, including the maiden name of a woman, if married; age; date and place of birth; marital status; occu-

pation; social security number, if any; whether the applicant is presently a United States citizen; address and place of abode and length of residence in the Commonwealth and in the precinct; place and time of any previous registrations to vote; and whether the applicant has ever been adjudicated to be mentally incompetent or convicted of a felony, and if so, under what circumstances the applicant's right to vote has been restored. Except as otherwise provided in this Constitution, all applications to register shall be completed in person before the registrar and by or at the direction of the applicant and signed by the applicant, unless physically disabled. No fee shall be charged to the applicant incident to an application to register.

Nothing in this article shall preclude the General Assembly from requiring as a prerequisite to registration to vote the ability of the applicant to read and complete in his own handwriting the application to register.

Section 24-17, Code of Virginia (1950), as amended, Vol. 5, p. 226

"§ 24-17. *Persons entitled to vote at all general elections.*—Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the general election, in which he offers to vote, has been duly registered under the provisions of § 24-67, and who, at least six months prior to such election in which he offers to vote, has personally paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. Removal

from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal."

Section 24.1-41, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 68-69

"§ 24.1-41. *Persons entitled to vote at all general elections.*—Every citizen of the United States twenty-one years of age, who has been a resident of the Commonwealth one year, of the county, city or town six months, and of the precinct in which he offers to vote thirty days next preceding the general election in which he offers to vote, has been duly registered unless exempted therefrom, and is otherwise qualified, under the Constitution and laws of this Commonwealth shall be entitled to vote for members of the General Assembly and all officers elective by the qualified voters. Removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal.

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at the next ensuing general elections."

Section 24.1-47, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 71

"§ 24.1-47. *Who to be registered.*—Each registrar shall register every citizen of the United States, of his election district who shall apply in person to be registered at the time and in the manner, required by law, and who, at the time of the next general election, shall have the qualifications of age and residence required by the Constitution of Virginia."

Section 24.1-227, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 113

"§ 24.1-227. *When absent voter may vote.*—The following persons may vote by absentee ballot in accordance with the provisions of this chapter in any election in which they are qualified to vote:

"(1) Any duly registered person who will, in the regular and orderly course of his business, profession, or occupation or while on vacation, be absent on the day of election from the county or city in which he is entitled to vote;

"(2) Any person on active service as a member of the armed forces of the United States, who will be absent on the day of election from the county or city in which he is entitled to vote;

"(3) Any duly registered person, who is the spouse of any person on active service as a member of the armed forces of the United States or who is a student, or the spouse of a student attending any school or institution of learning, or any person, or the spouse accompanying such person, regularly employed in business, profession or occupation outside the continental limits of the United States, and who will be absent on the day of election from the county or city in which he is entitled to vote; or

"(4) Any duly registered person who is ill or physically unable to attend the polls on the day of election."

Section 24.1-228, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 113, 114

"§ 24.1-228. *Application for absentee ballots.*—It shall be the duty of the electoral board of each county or city to furnish the general registrar with a sufficient number of applications for official ballots on forms prescribed by the

State Board of Elections; and it shall be the duty of such registrars to furnish an application form, in person or by mail to any qualified voter requesting the same for the purpose of offering to vote in an election by absentee ballot.

"All applications for absentee ballots shall be made in writing to the appropriate registrar and delivered to him by the applicant in person or by mail as may be required not less than five nor more than forty days prior to the election in which the applicant offers to vote. Such applications shall be signed by the applicant under the penalty of perjury as to the facts therein stated.

"Applications for absentee ballots shall be as follows:

"(1) An application made under § 24.1-227(1), which shall be completed in person before the general registrar or a member of the electoral board only in the office of the registrar or secretary, shall be made on the form furnished by the registrar, signed by the applicant in the presence of either the registrar or a member of the electoral board and shall contain the following information:

"(a) The reason why the applicant will be absent;

"(b) The name or number of precinct in which the applicant offers to vote, and

"(c) A statement that he is a resident of and duly registered in such precinct.

" (2) An application of a member of the armed forces, made under § 24.1-227(2), or of the spouse of a member of the armed forces made under § 24.1-227(3), which shall contain the following information:

"(a) A statement that the applicant or the spouse of the applicant is on active service as a member of the armed forces of the United States and the applicant will be absent

from the county or city in which he is entitled to vote on the day of election;

"(b) The name or number of precinct in which he offers to vote and a statement that he is a legal resident thereof;

"(c) The branch of service to which he or the spouse belongs, his or the spouse's rank, grade or rate, service identification number, his home and service addresses and the date of his birth, and

"(d) In the case of the spouse of a serviceman, a statement that the applicant is duly registered in the precinct wherein the ballot will be cast.

"(3) An application made under subsections (3) or (4) of § 24.1-227 which shall be signed by the applicant in the presence of one subscribing witness, who shall subscribe the same and vouch, subject to the penalty of perjury, that to the best of his knowledge and belief the facts contained in the application as to which he has knowledge, are true and shall contain the following appropriate information:

"(a) The reason why the applicant will be absent;

"(b) In the case of a student or the spouse of a student attending a school or institution of learning, the name and address of such school or institution of learning;

"(c) In the case of a person who is ill or physically unable to attend the polls on the day of election, the nature of the illness or physical disability;

"(d) In the case of a person, or the spouse accompanying such person, who is regularly employed outside the continental limits of the United States, the name and address of his employer and his address within and outside of the United States;

"(e) The name or number of precinct in which the applicant offers to vote and a statement that he is a legal resident thereof, and duly registered;

"(f) The application shall be accompanied by sufficient postage or legal tender, as indicated thereon, to defray the cost of mailing the ballot to the applicant, if to be delivered by mail."

Section 24.1-229, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 114, 115, 116

"§ 24.1-229. *Duty of registrar and electoral board upon receipt of application; voucher; coupon.*—The general registrar, upon receipt of the application for a ballot, if the applicant is duly registered where registration is required, shall enroll the name and address of the applicant on the list to be made and kept by him for the purpose, and shall either forward the application forthwith to the secretary of the electoral board, noting thereon that the applicant is a registered voter, if registration is required, or approve the application, note the fact of registration, and return it to the applicant for delivery to the secretary of the electoral board. If it then appears to the electoral board that the applicant is a resident and registered voter, if required, of the precinct in which he offers to vote, the electoral board shall send to the applicant by registered or certified mail, with return receipt requested, or deliver to him in person, except in the case of a person on active service as a member of the armed forces of the United States, the following items and nothing else; provided ,however, that if the applicant states as the reason for his absence on election day any of those set forth in § 24.1-227(1), the registrar or the secretary of the electoral board, upon the determination of the qualification of the applicant to vote, shall deliver the

following items only to the applicant himself in proper person and no item shall be removed by the applicant from the office of the registrar or the secretary of the electoral board:

"(a) An envelope containing the folded ballot, sealed and marked 'ballot within. Do not open except in presence of a notary public or other officer mentioned in § 24.1-232.'

"(b) An envelope for resealing the marked ballot, on which is printed the 'voucher,' in the following form:

"Voucher.

" 'This is to certify that the enclosed ballot was received by me upon my application to the registrar of the ..... (county or city) of ....., Virginia. The envelope marked "ballot within" was opened by me in the presence of ....., notary public (or other person mentioned in § 24.1-232) of the ..... (county or city), marked while in his presence, without assistance or knowledge on the part of anyone as to manner in which same was prepared, and then and there sealed as provided by law.

(Signed).....

Teste: .....
Notary Public (or other person
mentioned in § 24.1-232)'

"(c) A properly addressed envelope for the return of the ballot to the electoral board by registered or certified mail or by the applicant in person and, if available, the appropriate blank material required to register or certify the mail.

"(d) A printed slip giving instructions as to the manner of making out the voucher on the envelope for the return

of the ballot hereinafter mentioned and how the same shall be returned.

"(e) A 'coupon,' in the following form:

" 'Coupon.

" 'Name (given by voter) ....., height....., age (given by voter) ....., weight (estimated) ....., color of hair ....., color of eyes ....., birthplace (given by voter) ....., occupation (given by voter) ....., State and county or city where voter claimed to have last voted .....

" 'To the best of my knowledge, the above information is correct, and the applicant has complied with the requirements of the law as above provided. I have no knowledge whatever of the marking, erasure, or intent of the ballot enclosed.

(Signed) .....
Notary Public (or other person mentioned in § 24.1-232).'

"If the applicant is on active service as a member of the armed forces of the United States, the electoral board shall mail or deliver in person to the applicant in person the ballot as set forth in (a) above accompanied by the instruction slip set forth in (d) above. The covering envelope shall contain in the lower left-hand corner the words 'Official Virginia Armed Forces Ballot,' or such other words as the acts of Congress or regulations of the transmitting federal agency may require. A return envelope, as set forth in (c) above shall be furnished and in the lower left-hand corner shall appear the same words as on the covering envelope. In addition an envelope for use as prescribed in (b) above

shall be furnished and shall have printed thereon, in lieu of the word 'Voucher,' the following to be completed:

'Official Virginia Armed Forces Ballot.
'Voter must place ballot herein and seal.'

and upon the other side the following words:

'Oath of Voter.

'I do swear (or affirm) that I am now and have been a citizen and domiciliary resident of Virginia since the ..... day of ....., 19....., and am a resident of the (county or city) of ....., residing at ..... (street and number or place of residence therein), and am now in active service in the Armed Forces of the United States; that I am at least twenty-one years of age or will be on the ..... day of ....., 19....., and that by exercising the privilege of voting I acknowledge and accept all responsibilities and obligations of full citizenship of the Commonwealth of Virginia. The name and/or number of my voting precinct is ..... (if known, so state).

'Signature of voter: .....

'Subscribed and sworn to before me this ..... day of ....., 19.....

'Signature of officer: .....

.....

Rank and Title of Officer—
Identification No. (or other person mentioned in § 24.1-232).' "

Section 24.1-232, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 117

"§ 24.1-232. *How ballots marked and returned; ballots cast in person.*—Upon receipt of the registered or certified letter forwarded by the electoral board, the voter shall not open the sealed envelope, marked 'ballot within,' except in the presence of a notary public or other officer authorized by law to take acknowledgments to deeds or in the case of a serviceman a commissioned officer in the armed forces, and shall then and there mark, as provided in § 24.1-129, and refold the ballot without assistance and without making known the manner of marking same. He shall then and there place the ballot in the envelope provided for the purpose, seal the envelope, and fill in and sign the voucher printed on the back of the envelope in the presence of a notary public or other officer hereinabove provided, who shall witness the same in writing. This envelope, together with the coupon, which must be filled out and signed by the notary public, or other officer as herein provided, shall be enclosed within the envelope directed to the electoral board which shall then and there be sealed, and shall be registered or certified and mailed, with return receipt requested, to the electoral board, or delivered personally by the voter to the electoral board or to the general registrar.

"In the event that the applicant comes under § 24.1-227 (1), he shall follow the same procedure as set forth above except that it shall be done in person, upon receipt of the items set forth in § 24.1-229, before either the general registrar or the secretary of the electoral board, in lieu of a notary, and failure to do so will render the applicant's ballot void. Such applicant shall comply with this section and vote in person not less than five days prior to the election in which he offers to vote."

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Supreme Court, U.S.
FILED
OCT 15 1970
E. ROBERT SEAVER, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA,	)
	(
Plaintiff,	)
	(
v.	)
	(
STATE OF IDAHO	)
	(
Defendant	)
	(
	)

ANSWER FOR THE STATE OF IDAHO

ROBERT M. ROBSON
Attorney General
State of Idaho

RICHARD H. GREENER
Assistant Attorney General
State of Idaho
Statehouse
Boise, Idaho 83707

Attorneys for Defendant

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
STATE OF IDAHO Defendant	)

ANSWER FOR THE STATE OF IDAHO

The State of Idaho, Defendant, for its answer to the Complaint heretofore filed in the above captioned cause, admits, denies, and alleges as follows:

In answer to the first cause of action, the State of Idaho:

I.

Admits all the allegations contained in the first cause of action in Plaintiff's Complaint except that allegation contained in Paragraph VII thereof which alleges that the continued enforcement of durational residency requirements and absentee voting provisions to the extent inconsistent with Section 202 of the Voting Rights Act of 1965,

as amended, is unlawful under Article VI of the Constitution of the United States, which allegation is specifically denied.

In answer to the second cause of action alleged:

II.

Admits all the allegations contained in the second cause of action in Plaintiff's Complaint except that allegation contained in Paragraph XIII of the Complaint which alleges that the continued enforcement of age requirements for registration and voting contained in the constitution and statutes of the State of Idaho in conflict with Section 302 of the Voting Rights Act of 1965, as amended, is violative of the Constitution of the United States, which allegation is specifically denied.

III.

Defendant specifically alleges that the enforcement of Section 202 of Title II of the Voting Rights Act of 1965, as amended, and Section 302, Title III, of the Voting Rights Act of 1965, as amended, against Defendant is prohibited by the Constitution of the United States.

Defendant having answered the Complaint, prays this Court to enter a declaratory judgment that Sections 202 and 302 of the Voting Rights Act of 1965, as amended, are in violation of the Constitution of the United States and unenforceable against the Defendant and to render to the Defendant such other relief as it may deem proper in the above entitled matter.

DATED this 10 day of October, 1970.

Robert M. Robson

ROBERT M. ROBSON
Attorney General
State of Idaho
Statehouse, Boise, Idaho 83707

ATTORNEY FOR DEFENDANT

PROOF OF SERVICE

I, Robert M. Robson, Attorney General of Idaho, hereby certify that on the 10 day of October, 1970, I served the foregoing Answer for the Defendant upon the Plaintiff by depositing a copy in the United States Mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530.

Robert M. Robson

ROBERT M. ROBSON

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—OCTOBER TERM, 1970

43	State of Oregon, Plaintiff, *v.* John N. Mitchell, Attorney General of the United States.	On Bills of Complaint.
44	State of Texas, Plaintiff, *v.* John N. Mitchell, Attorney General of the United States.	
46	United States, Plaintiff, *v.* State of Arizona.	
47	United States, Plaintiff, *v.* State of Idaho.	

[December 21, 1970]

MR. JUSTICE BLACK, announcing the judgments of the Court in an opinion expressing his own view of the cases.

In these suits the States resist compliance with the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, because they believe that the Act takes away from them powers reserved to the States by the Constitution to control their own elections.[1] By its terms the Act

[1] In Nos. 43 and 44 Oregon and Texas respectively invoke the original jurisdiction of this Court to sue the United States Attorney General seeking an injunction against the enforcement of Title III (18-year-old vote) of the Act. In No. 46 the United States invokes our original jurisdiction seeking to enjoin Arizona from enforcing its laws to the extent that they conflict with the Act, and directing

does three things. First: It lowers the minimum age of voters in both state and federal elections from 21 to 18. Second: Based upon a finding by Congress that literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national. Third: The Act forbids States from disqualifying voters in national elections for presidential and vice presidential electors because they have not met state residency requirements.

For the reasons set out in Part I of this opinion, I believe Congress can fix the age of voters in national elections, such as congressional, senatorial, Vice-Presidential and Presidential elections, but cannot set the voting age in state and local elections. For reasons expressed in separate opinions, my Brothers DOUGLAS, BRENNAN, WHITE, and MARSHALL join me in concluding that Congress can enfranchise 18-year-old citizens in national elections, but dissent from the judgment that Congress cannot extend the franchise to 18-year-old citizens in state and local elections. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, HARLAN, STEWART, and BLACKMUN join me in concluding that Congress cannot interfere with the age for voters set by the States for state and local elections. They, however, dissent from the judgment that Congress can control voter qualifications in federal elections. In summary, it is the judgment of the Court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970

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the officials of Arizona to comply with the provisions of Title II (nationwide literacy test ban) and Title III (18-year-old vote) of the Act. In No. 47 the United States invokes our original jurisdiction seeking to enjoin Idaho from enforcing its laws to the extent that they conflict with Title II (abolition of residency requirements in presidential and vice presidential elections) and Title III (18-year-old vote) of the Act. No question has been raised concerning the standing of the parties or the jurisdiction of this Court.

are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections.

For the reasons set out in Part II of this opinion, I believe that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment. Therefore the literacy test provisions of the Act are upheld.

For the reasons set out in Part III of this opinion, I believe Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice presidential electors. For reasons expressed in separate opinions, my Brothers THE CHIEF JUSTICE, DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN concur in this judgment. My Brother HARLAN, for the reasons stated in his separate opinion, considers that the residency provisions of the statute are unconstitutional. Therefore the residency and absentee balloting provisions of the Act are upheld.

I

The Framers of our Constitution provided in Art. I, § 2, that members of the House of Representatives should be elected by the people and that the voters for Representatives should have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Senators were originally to be elected by the state legislatures, but under the Seventeenth Amendment Senators are also elected by the people, and voters for Senators have the same qualifications as voters for Representatives. In the very beginning the responsi-

bility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed advisable.[2] This was done in Art. I, § 4, of the Constitution which provides:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be

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[2] Article I, § 4 was a compromise between those delegates to the Constitutional Convention who wanted the States to have final authority over the election of all state and federal officers and those who wanted Congress to make laws governing national elections, 2 Story, Commentaries on the Constitution of the United States 280–292 (1st ed. 1883). The contemporary interpretation of this compromise reveals that those who favored national authority over national elections prevailed. Six States included in their resolutions of ratification the recommendation that a constitutional amendment be adopted to curtail the power of the Federal Government to regulate national elections. Such an amendment was never adopted.

A majority of the delegates to the Massachusetts ratifying convention must have assumed that Art. I, § 4 gave very broad powers to Congress. Otherwise that convention would not have recommended an amendment providing:

"That Congress do not exercise the powers vested in them by the 4th section of the 1st Article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution." 2 Elliot's Debates on the Federal Constitution 177 (1876).

The speech of Mr. Cabot, one delegate to the Massachusetts convention, who argued that Art. I, § 4, was "to be as highly prized as any in the Constitution," expressed a view of the breadth of that section which must have been shared by most of his colleagues.

"[I]f the State Legislatures are suffered to regulate conclusively the election of the democratic branch, they may . . . finally annihilate, that control of the general government which the people ought always have . . . . *Id.*, at 26.

And Cabot was supported by Mr. Parsons, who added:

". . . They might make an unequal and partial division of the states into districts for election of representatives, or they might

prescribed in each state by the legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Place of Chusing Senators." (Emphasis supplied.)

Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). In *United States* v. *Classic*, 313 U. S. 299 (1941), where the Court upheld congressional power to regulate party primaries, Mr. Justice Stone speaking for the Court construed the interrelation of these clauses of the Constitution, stating:

> "While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.'" 313 U. S., at 315.

See also *Ex parte Siebold*, 100 U. S. 371 (1879); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900).

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even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the fourth section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.*, at 27.

The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. In the ratifying conventions speakers "argued that the power given Congress in Art. 1, § 4, was meant to be used to vindicate the people's right to equality of representation in the House," *Wesberry* v. *Sanders*, 376 U. S. 1, 16 (1964), and that Congress would "most probably . . . lay the state off into districts." And in *Colegrove* v. *Green*, 328 U. S. 549 (1946), no Justice of this Court doubted Congress' power to rearrange the congressional districts according to population; the fight in that case revolved about the judicial power to compel redistricting.

Surely no voter *qualification* was more important to the Framers than the *geographical qualification* embodied in the concept of congressional districts. The Framers expected Congress to use this power to eradicate "rotten boroughs," [3] and Congress has in fact used its power to prevent States from electing all Congressmen at large.[4] There can be no doubt that the power to alter congressional district lines is vastly more significant in its effect than the power to permit 18-year-old citizens to go to the polls and vote in all federal elections.

Any doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters should be dispelled by the opinion of this Court in *Smiley* v. *Holm*, 285 U. S. 355 (1932). There, Chief Justice Hughes writing for a unan-

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[3] See *Wesberry* v. *Sanders*, 376 U. S. 1, 14–16 (1964).

[4] See, *e. g.*, Act of August 8, 1911, c. 5, 37 Stat. 13.

imous Court discussed the scope of congressional power under § 4 at some length. He said:

"The subject matter is the 'times, places and manner of holding elections for Senators and Representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . .

"This view is confirmed by the second clause of Article I, section 4, which provides that 'the Congress may at any time by law make or alter such regulations,' with the single exception stated. The phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. . . . It 'has a general supervisory power over the whole subject.'" *Id.*, at 366–367.

In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them.[5] A newly created

[5] My Brother STEWART has cited the debates of the Constitutional Convention to show that Oliver Ellsworth, George Mason, Madison, and Franklin successfully opposed granting Congress the

national government could hardly have been expected to survive without the ultimate power to rule itself and to fill its offices under its own laws. The Voting Rights Act Amendments of 1970 now before this Court evidence dissatisfaction of Congress with the voting age set by many of the States for national elections. I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections.[6] Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.[7]

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power to regulate federal elections, including the qualifications of voters, in the original Constitution. I read the history of our Constitution differently. Mr. Madison, for example, explained Art. I, § 4, to the Virginia ratifying convention follows:

"[I]t was thought that the regulation of the time, place and manner, of electing Representatives, should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any State by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 Elliot's Debates on the Federal Constitution 367 (1876).

And Mr. Mason, who was supposedly successful in opposing a broad grant of power to Congress to regulate federal elections, still found it necessary to support an unsuccessful Virginia proposal to curb the power of Congress under Art. I, § 4. *Id.*, at 403.

[6] See, *e. g.*, *Ex parte Siebold*, 100 U. S. 371 (1879); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *United States* v. *Mosley*, 238 U. S. 383 (1915); *United States* v. *Classic*, 313 U. S. 299 (1941).

[7] With reference to the selection of the President and Vice President, Art. II, § 1 provides: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Elec-

On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother HARLAN has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment,[8] the power to regulate elections. My major disagreement with my Brother HARLAN is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices. *Pope* v. *Williams*, 193 U. S. 621 (1904); *Minor* v. *Happersett*, 21 Wall. 162 (1874).

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tors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . ." But this Court in *Burroughs* v. *United States*, 290 U. S. 534 (1934), upheld the power of Congress to regulate certain aspects of elections for presidential and vice-presidential electors, specifically rejecting a construction of Art. II, § 1, that would have curtailed the power of Congress to regulate such elections. Finally, and most important, inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause.

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. Amend. X.

Moreover, Art. I, § 2,[9] is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4. It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. Amendments Fourteen, Fifteen, Nineteen, and Twenty-Four, each of which has assumed that the States had general supervisory power over state elections, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty Fourth Amendments superfluous. My Brother BRENNAN's opinion, if carried to its logical conclusion, would, under the guise of insuring equal protection, blot out all state power, leaving the 50 States little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.

Of course, the original design of the Founding Fathers was altered by the Civil War Amendments and various

[9] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

other amendments to the Constitution. The Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments have expressly authorized Congress to "enforce" the limited prohibitions of those amendments by "appropriate legislation." The Solicitor General contends in these cases that Congress can set the age qualifications for voters in state elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment.

Above all else, the Framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. *Loving* v. *Virginia,* 388 U. S. 1 (1967); *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960); *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Slaughter House Cases,* 16 Wall. 36, 71–72 (1872). While this Court has recognized in some instances that the Equal Protection Clause of the Fourteenth Amendment protects against discriminations other than those on account of race,[10] see *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Hadley* v. *Junior College District,* 397 U. S. 50 (1970); see also *Kotch* v. *Board of River Port Pilots,* 330 U. S. 552 (1947), and cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the

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[10] My Brother BRENNAN relies upon *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969); and *Evans* v. *Cornman,* 398 U. S. 419 (1970). These typical equal protection cases in which I joined are not relevant or material to our decision in the cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but rather which political body, state or federal, is empowered to fix the minimum age of voters. The Framers intended the States to make the voting age decision in all elections with the provision that Congress could override state judgments concerning the qualifications of voters in federal elections.

original Constitution, to govern themselves. The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race.

To fulfill their goal of ending racial discrimination and to prevent direct or indirect state legislative encroachment on the rights guaranteed by the amendments, the Framers gave Congress power to enforce each of the Civil War Amendments. These enforcement powers are broad. In *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 439 (1968), the Court held that § 2 of the Thirteenth Amendment "clothed 'Congress with the power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*'" In construing § 5 of the Fourteenth Amendment, the Court has stated:

> "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.*" *Ex parte Virginia*, 100 U. S. 339, 345 (1879). (Emphasis added.)

And in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966) (MR. JUSTICE BLACK dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965 under Congress' Fifteenth Amendment enforcement power.

As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only "enforce" the provisions of the amendments and may do so only by "appropriate legislation." Congress has no power under the enforcement sections to undercut the Amendments' guarantees of personal equality and freedom from discrimination, see *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 n. 10 (1966), or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.[11]

Of course, we have upheld congressional legislation under the Enforcement Clauses in some cases where Congress has interfered with state regulation of the local electoral process. In *Katzenbach* v. *Morgan*, *supra*, the Court upheld a statute which outlawed New York's requirement of literacy in English as a prerequisite for voting as this requirement was applied to Puerto Ricans with certain educational qualifications. The New York

[11] See: the First Amendment, *e. g.*, *Gitlow* v. *New York*, 268 U. S. 652 (1925); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); the Fifth Amendment, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Benton* v. *Maryland*, 395 U. S. 784 (1969); the Sixth Amendment, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Pointer* v. *Texas*, 380 U. S. 400 (1965); *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967); *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); and the Eighth Amendment, *Robinson* v. *California*, 370 U. S. 660 (1962).

statute overridden by Congress applied to all elections. And in *South Carolina* v. *Katzenbach, supra* (MR. JUSTICE BLACK dissenting on other grounds), the Court upheld the literacy test ban of the Voting Rights Act of 1965. That Act proscribed the use of the literacy test in all elections in certain areas. But division of power between state and national governments, like every provision of the Constitution, was expressly qualified by the Civil War Amendments' ban on racial discrimination. Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments. Cf. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670 (1966) (dissenting opinion of MR. JUSTICE BLACK).

In enacting the 18-year-old vote provisions of the Act now before the Court, Congress made no legislative findings that 21-year-old vote requirements were used by the States to disenfranchise voters on account of race. I seriously doubt that such a finding, if made, could be supported by substantial evidence. Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold that Congress has exceeded its powers in attempting to lower the voting age in state and local elections. On the other hand, where Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race.

To invalidate part of the Voting Rights Act Amendments of 1970, however, does not mean that the entire Act must fall or that the constitutional part of the 18-year-old vote provision cannot be given effect. In

passing the Voting Rights Act Amendments of 1970, Congress recognized that the limits of its power under the Enforcement Clauses were largely undetermined, and therefore included a broad severability provision:

> "If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination."

In this case, it is the judgment of the Court that Title III, lowering the voting age to 18, is invalid as applied to voters in state and local elections. It is also the judgment of the Court that Title III is valid with respect to national elections. We would fail to follow the express will of Congress in interpreting its own statute if we refuse to sever these two distinct aspects of Title III. Moreover, it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part. See, *e. g.*, *Watson* v. *Buck*, 313 U. S. 387 (1941); *Marsh* v. *Buck*, 313 U. S. 406 (1941). Here, of course, the enforcement of the 18-year-old vote in national elections is in no way dependent upon its enforcement in state and local elections.

II

In Title I of the Voting Rights Act Amendments of 1970 Congress extended the provisions of the Voting Rights Act of 1965 which ban the use of literacy tests in certain States upon the finding of certain conditions by the United States Attorney General. The Court upheld the provisions of the 1965 Act over my partial dissent in *South Carolina* v. *Katzenbach*, *supra*, and *Gaston*

County v. *United States*, 395 U. S. 285 (1969). The constitutionality of Title I is not raised by any of the parties to these suits.[12]

In Title II of the Amendments Congress prohibited the use of any test or device resembling a literacy test in any national, state, or local election in any area of the United States where such test is not already proscribed by the Voting Rights Act of 1965. The State of Arizona maintains that Title II cannot be enforced to the extent that it is inconsistent with Arizona's literacy test requirement. Ariz. Rev. Stat. Ann. §§ 16–101.A.4, 16–101.A.5 (1956). I would hold that the literacy test ban of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment and that it supersedes Arizona's conflicting statutes under the Supremacy Clause of the Federal Constitution.

In enacting the literacy test ban of Title II Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. Congress could have found that as late as the summer of 1968, the percentage registration of nonwhite voters in seven Southern States was substantially below the percentage registration of white voters.[13] Moreover, Congress had before it striking evidence to show that the provisions of the 1965 Act had in the span of four

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[12] Yuma County, Arizona, is presently subject to the literacy test ban on the Voting Rights Act of 1965 pursuant to a determination of the Attorney General under § 4 (a) of the 1965 Act. I do not understand Arizona to contest the application of the 1965 Act or its extension to that county. Arizona "does not question" Congress' authority to enforce the Fourteenth and Fifteenth Amendments "when Congress possesses a 'special legislative competence'; and cites *South Carolina* v. *Katzenbach*, 383 U. S. 641 (1966), with approval. Answer and Brief for Arizona, No. 46 Orig., O. T. 1970.

[13] Hearings on H. R. 4249, H. R. 5538, and Similar Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, pt. 3, at 14 (1969).

years had a remarkable impact on minority group voter registration.[14] Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the statewide average.[15] Arizona also has a serious problem of deficient voter registration among Indians. Congressional concern over the use of literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. *Katzenbach* v. *Morgan, supra.* And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.[16]

Congress also had before it this country's history of discriminatory educational opportunities in both the North and the South. The children who were denied an equivalent education by the "separate but equal" rule of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), overruled in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), are now old enough to vote. There is substantial, if not overwhelming, evidence from which Congress could have concluded that it is a denial of equal protection to condition the political participation of children educated in a dual school system upon their educational achievement. Moreover, the history of this legislation suggests that concern with educational inequality was perhaps uppermost in the minds of the congressmen who sponsored the Act. The hearings are filled with references to educa-

[14] *Id.,* at 93.

[15] Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 before the Subcommittee on Consitutional Rights of the Senate Committee on the Judiciary, at 406 (1969–1970).

[16] *Id.,* at 401.

tional inequality. Faced with this and other evidence that literacy tests reduce voter participation in a discriminatory manner not only in the South but throughout the Nation, Congress was supported by substantial evidence in concluding that a nationwide ban on literacy tests was appropriate to enforce the Civil War Amendments.

Finally, there is yet another reason for upholding the literacy test provisions of this Act. In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is—a serious *national* dilemma that touches every corner of our Land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation. Compare *South Carolina* v. *Katzenbach, supra,* and *Gaston County* v. *United States, supra.*

III

In Title II of the Voting Rights Act Amendments Congress also provided that in presidential and vice presidential elections, no voter could be denied his right to cast a ballot because he had not lived in the jurisdiction long enough to meet its residency requirements. Furthermore, Congress provided uniform national rules for absentee voting in presidential and vice presidential elections. In enacting these regulations for national elections Congress was attempting to insure a fully effective voice to all citizens in national elections. What I said in Part I of this opinion applies with equal force here. Acting under its broad authority to create and maintain a national government, Congress unquestionably has power under the Constitution to regulate fed-

eral elections. The Framers of our Constitution were vitally concerned with setting up a national government that could survive. Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill those offices are as responsive as possible to the will of the people whom they represent.

Our judgment today gives the Federal Government the powers the Framers conferred upon it, that is, the final control of the elections of its own officers. Our judgment also saves for the States the power to control state and local elections which the Constitution originally reserved to them and which no subsequent amendment has taken from them.[17] The generalities of the Equal Protection Clause of the Fourteeth Amendment were not designed or adopted to render the States impotent to set voter qualifications in elections for their own local officials and agents in the absence of some specific constitutional limitations.

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[17] That these views are not novel is demonstrated by Mr. Justice Story in his Commentaries on the Constitution of the United States, vol. II, at 284–285 (1st ed. 1833).

"There is, too, in the nature of such a provision [Article I, § 4], something incongruous, if not absurd. What would be said of a clause introduced into a national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments. It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of the pleasure of the national government. *Why does not the same reasoning apply to the national government?* What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?" (Emphasis added.) (Footnote omitted.)

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—October Term, 1970

State of Oregon, Plaintiff,		
43	*v.*	
John N. Mitchell, Attorney General of the United States.		
State of Texas, Plaintiff,		
44	*v.*	
John N. Mitchell, Attorney General of the United States.		On Bills of Complaint.
United States, Plaintiff,		
46	*v.*	
State of Arizona.		
United States, Plaintiff,		
47	*v.*	
State of Idaho.		

[December 21, 1970]

Mr. Justice Douglas.

I dissent from the judgment of the Court insofar as it declares § 302 unconstitutional as applied to state elections and concur in the judgment as it affects federal elections but for different reasons. I rely on the Equal Protection Clause and on the Privileges and Immunities Clause of the Fourteenth Amendment.

I

The grant of the franchise to 18-year-olds by Congress is in my view valid across the board.

I suppose that in 1920, when the Nineteenth Amendment was passed giving women the right to vote, it was assumed by most constitutional experts that there was

no relief by way of the Equal Protection Clause of the Fourteenth Amendment. In *Minor* v. *Happersett*, 21 Wall. 162, the Court held in the 1874 Term that a State could constitutionally restrict the franchise to men. While the Fourteenth Amendment was relied upon, the thrust of the opinion was directed at the Privileges and Immunities Clause with a subsidiary reference to the Due Process Clause. It was much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—that discrimination against voters on grounds *other than race* was struck down.

The first case in which this Court struck down a statute under the Equal Protection Clause of the Fourteenth Amendment was *Strauder* v. *West Virginia*, 100 U. S. 303, decided in the 1879 Term.[1] In the 1961 Term we squarely held that the manner of apportionment of members of a state legislature raised a justiciable question under the Equal Protection Clause, *Baker* v. *Carr*, 369 U. S. 186. That case was followed by numerous others, *e. g.*: that one person could not be given twice or 10 times the voting power of another person in a statewide election merely because he lived in a rural area or in the smallest rural county;[2] that the principle of

[1] Strauder was tried for murder. He had sought removal to federal courts on the ground that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on the petit jury in the State. *Id.*, at 304. He was convicted of murder and the West Virginia Supreme Court affirmed. This Court held the West Virginia statute limiting jury duty to whites only unconstitutional:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations . . . [The aim of the Fourteenth Amendment] was against discrimination because of race or color." 100 U. S., at 310.

[2] *Gray* v. *Sanders*, 372 U. S. 368; *Davis* v. *Mann*, 377 U. S. 678; *Swann* v. *Adams*, 385 U. S. 440; *Kilgarn* v. *Hill*, 386 U. S. 120; *Avery* v. *Midland County*, 390 U. S. 474; *Moore* v. *Ogilvie*, 394 U. S. 814; *Hadley* v. *Junior College*, 397 U. S. 50.

equality applied to both Houses of a bicameral legislature; [3] that political parties receive the protection under the Equal Protection Clause just as voters do.[4]

The reapportionment cases, however, are not quite in point here, though they are the target of my Brother HARLAN's dissent. His painstaking review of the history of the Equal Protection Clause leads him to conclude that "political" rights are not protected though "civil" rights are protected. The question of what questions are "political" has been a recurring issue in this Court from the beginning, and we recently reviewed them all in *Baker* v. *Carr*, *supra*, and in *Powell* v. *McCormack*, 395 U. S. 486. *Baker* v. *Carr* was a reapportionment case and *Powell* v. *McCormack* involved the exclusion from the House of Representatives of a Congressman. The issue of "political" question versus "justiciable" question was argued *pro* and *con* in those cases; and my Brother HARLAN stated in *Baker* v. *Carr*, 369 U. S., at 330 *et. seq.*, and on related occasions (*Gray* v. *Sanders*, 372 U. S. 368, 382; *Westbury* v. *Sanders*, 376 U. S. 1, 20; *Reynolds* v. *Sims*, 377 U. S. 533, 589) his views on the constitutional dimensions of the "political" question in the setting of the reapportionment problem.

Those cases involved the question whether legislatures must be so structured as to reflect with approximate

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[3] *Reynolds* v. *Sims*, 377 U. S. 533; *WMCA* v. *Lorenzo*, 377 U. S. 633; *Roman* v. *Sincock*, 377 U. S. 695.

[4] *Williams* v. *Rhodes*, 393 U. S. 23. We also held in federal elections that the command of Art. I, § 2 of the Constitution that representatives be chosen "by the People of the several States" means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U. S. 1, 7–8, and that that meant "vote-diluting discrimination" could not be accomplished "through the device of districts containing widely varied numbers of inhabitants." *Id.*, at 8; *Lucas* v. *Colorado General Assembly*, 377 U. S. 713; *Kirkpatrick* v. *Preisler*, 394 U. S. 526; *Wells* v. *Rockefeller*, 394 U. S. 542.

equality the voice of every voter. The ultimate question was whether absent a proper apportionment by the legislature a federal court could itself make an apportionment. That kind of problem raised issues irrelevant here. Reapportionment, as our experience shows, presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other nonlegal factors play varying roles. The competency of courts to deal with them was challenged. Yet we held the issues were justiciable. None of those so-called "political" questions are involved here.

This case, so far as equal protection is concerned, is no whit different from a controversy over a state law that disqualifies women from certain types of employment, *Goesaert* v. *Cleary*, 335 U. S. 464, or that imposes a heavier punishment on one class of offender than on another whose crime is not intrinsically different. *Skinner* v. *Oklahoma*, 316 U. S. 535. The right to vote is, of course, different in one respect from the other rights in the economic, social, or political field which as indicated in the Appendix to this opinion are under the Equal Protection Clause. The right to vote is a civil right deeply embedded in the Constitution. Art. I, § 2, provides that the House is composed of members "chosen . . . by the people" and the electors "shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment states that Senators shall be "elected by the people." The Fifteenth Amendment speaks of the "right of citizens of the United States to vote"—not only in federal but in state elections. The Court in *Ex parte Yarbrough*, 110 U. S. 651, 665, stated:

> "This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of Congress, is as neces-

> sary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination."

It was in that tradition that we said in *Reynolds* v. *Sims, supra,* at 555, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restriction on that right strikes at the heart of representative government."

This "right to choose, secured by the Constitution," *United States* v. *Classic,* 313 U. S. 314, 315, is a civil right of the highest order. Voting concerns "political" matters; but the right is not "political" in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the Court; and the claim has always been upheld as justiciable.[5] Whatever distinction may have been made, following the Civil War, between "civil" and "political" rights, has passed into history. In *Harper* v. *Virginia Board,* 383 U. S. 663, 669, we stated: "Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." That statement is in harmony with my view of the Fourteenth Amendment, as expressed by My Brother BRENNAN: "We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations." *Post,* at —. Hence the history of the Fourteenth Amendment tendered by my Brother HARLAN is irrelevant to the present problem.

Since the right is civil and not "political," it is protected by the Equal Protection Clause of the Fourteenth

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[5] *Ex parte Siebold,* 100 U. S. 371; *Ex parte Yarbrough,* 110 U. S. 651; *Guinn* v. *United States,* 238 U. S. 347; *United States* v. *Mosley,* 238 U. S. 383; *Lane* v. *Wilson,* 307 U. S. 268; *United States* v. *Classic,* 313 U. S. 299; *United States* v. *Saylor,* 322 U. S. 385.

Amendment which in turn by § 5 of that Amendment can be "enforced" by Congress.

In *Carrington* v. *Rash*, 380 U. S. 89, we held that Texas could not bar a person, otherwise qualified, from voting merely because he was a member of the armed services. Occupation, we held, when used to bar a person from voting, was that invidious discrimination which the Equal Protection Clause condemns. In *Evans* v. *Cornman*, 398 U. S. 419, we held that a State could not deny the vote to residents of a federal enclave when it treated them as residents for many other purposes. In *Harper* v. *Virginia Board*, 383 U. S., at 666, we held a State could not in harmony with the Equal Protection Clause keep a person from voting in state elections because of "the affluence of the voter or payment of any fee." In *Kramer* v. *Union School District*, 395 U. S. 621, we held that a person could not be barred from voting in school board elections merely because he was a bachelor. So far as the Equal Protection Clause was concerned, we said that the line between those qualified to vote and those not qualified turns on whether those excluded have "a distinct and direct interest in the school meeting decisions." *Id.*, at 632. In *Cipriano* v. *City of Houma*, 395 U. S. 701, we held that a state law which gave only "property taxpayers" the right to vote on the issuance of revenue bonds of a municipal utility system violated equal protection as "the benefits and burdens of the bond issue fall indiscriminately on property owner and non-property owner alike." *Id.*, at 705. And only on June 23, 1970, we held in *Phoenix* v. *Kolodziejski*, 399 U. S. 204, that it violates equal protection to restrict those who may vote on general obligation bonds to real property taxpayers. We looked to see if there was any "compelling state interest" in the voting restrictions. We held that "non-property owners" are not "substantially less interested in the issuance of these securities than are property

owners," *id.*, at 212, and that presumptively "when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise." [6] *Id.*, at 209. And as recently as November 9, 1970, we summarily affirmed a district court decision (310 F. Supp. 72) on the basis of *Kolodziejski*. *Parish School Board of St. Charles* v. *Stewart*, 400 U. S. —, where Louisiana gave a vote on municipal bonds issued only to "property taxpayers."

The powers granted Congress by § 5 of the Fourteenth Amendment to "enforce" the Equal Protection Clause are "the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Katzenbach* v. *Morgan*, 384 U. S. 641, 650. As we stated in that case, "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."

Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interests of equal protection. The Act itself brands the denial of the franchise to 18-year-olds as "a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed" on them. Section 301 (a)(1), Voting Rights Act of 1970, 84 Stat. 314, 42 U. S. C. § 1973. The fact that only males are drafted while the vote extends to females as well is not relevant, for the female component of these families or prospective fam-

[6] We noted that general obligation bonds may be satisfied not from real property taxes but from revenues from other local taxes paid by nonproperty owners as well as those who own realty. Moreover, we noted that property taxes paid initially by property owners are often passed on to tenants or customers. 399 U. S., at 209–211.

ilies is also caught up in war and hit hardest by it. Congress might well believe that men and women alike should share the fateful decision.

It is said, why draw the line at 18? Why not 17? Congress can draw lines and I see no reason why it cannot conclude that 18-year-olds have that degree of maturity which entitles them to the franchise. They are "generally considered by American law to be mature enough to contract, to marry, to drive an automobile, to own a gun, and to be responsible for criminal behavior as an adult."[7] Moreover, we are advised that under state laws, mandatory school attendance does not, as a matter of practice, extend beyond the age of 18. On any of these items the States, of course, have leeway to raise or lower the age requirements. But voting is "a fundamental matter in a free and democratic society," *Reynolds* v. *Sims*, 377 U. S. 533, 561. Where "fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confirmed." *Harper* v. *Virginia Board*, 383 U. S. 663, 670. There we were speaking of state restrictions on those rights. Here we are dealing with the right of Congress to "enforce" the principles of equality enshrined in the Fourteenth Amendment. The right to "enforce" granted by § 5 of that Amendment is, as noted, parallel with the Necessary and Proper Clause whose reach Chief Justice Marshall described in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

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[7] Engdahl, Constitutionality of the Voting Age Statute, 39 Geo. Wash. L. Rev. 1, 36 (1970).

Equality of voting by all who are deemed mature enough to vote is certainly consistent "with the letter and spirit of the constitution." Much is made of the fact that Art. 1, § 4 of the Constitution [8] gave Congress only the power to regulate the "manner of holding elections," not the power to fix qualifications for voting in elections. But the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth—made vast inroads on the power of the States. Equal protection became a standard for state action and Congress was given authority to "enforce" it. See *Katzenbach* v. *Morgan*, 384 U. S. 641, 647. The manner of enforcement involves discretion; but that discretion is largely entrusted to the Congress, not to the courts. If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress. But it is much too late in history to make that claim, as the cases listed in the Appendix to this opinion show. Moreover, election inequalities created by state laws and based on factors other than race may violate the Equal Protection Clause, as we have held over and over again. The reach of § 5 to "enforce" equal protection by eliminating election inequalities would seem quite broad. Certainly there is not a word of limitation in § 5 which would restrict its applicability to matters of race alone. And if, as stated in *McCulloch* v. *Maryland*, the measure of the power of Congress is whether the remedy is consistent "with the

[8] Art. 1, § 4 provides: "[1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

"[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."

letter and spirit of the constitution," we should have no difficulty here. We said in *Gray* v. *Sanders*, 372 U. S. 368, 381: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

It is a reasoned judgment that those who have such a large "stake" in modern elections as 18-year-olds, whether in times of war or peace, should have political equality. As the dissent in *Colegrove* v. *Green*, 328 U. S. 549, 566, made plain, the Equal Protection Clause does service to protect the right to vote in federal as well as in state elections.

I would sustain the choice which Congress has made.

II

I likewise find the objections which Arizona and Idaho make to the literacy and residence requirements of the 1970 Act to be insubstantial.

Literacy. We held in *Lassiter* v. *Northampton Election Board*, 360 U. S. 44, that a State could apply a literacy test in selecting qualified voters provided the test is not "discriminatory" and does not contravene "any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Id.*, at 51. The question in these cases is whether Congress has the power under § 5 of the Fourteenth Amendment to bar literacy tests in all federal, state, or local elections.

Section 201 bars a State from denying the right to vote in any federal, state, or local election because of "any test or device" which is defined, *inter alia*, to include illiteracy.[9] We traveled most of the distance needed to

[9] Section 201 (b) defines "test or device" as "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret

sustain this Act in *Katzenbach* v. *Morgan*, 384 U. S. 641, where we upheld the constitutionality of an earlier Act which prohibited the application of English literacy tests to persons educated in Puerto Rico. The power of Congress in § 5 to "enforce" the Equal Protection Clause was sufficiently broad, we held, to enable it to establish voting requirements which might pass muster under the Equal Protection Clause, absent an Act of Congress. *Id.*, 648–651.

The question, we said, was whether the Act of Congress was "appropriate legislation to enforce the Equal Protection Clause":

> "It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.*, at 653.

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any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

We also held that the Act might be sustained as an attack on the English language test as a device to discriminate. *Id.*, at 654. And we went on to say that Congress might have concluded that "as a means of furthering the intelligent exercise of the franchise, an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs." *Id.*, at 655.

We took a further step toward sustaining the present type of law in *Gaston County* v. *United States*, 395 U. S. 285. That decision involved a provision of the Voting Rights Act of 1965 which suspended the use of any "test or device," including illiteracy, as a prerequisite to registration in a State which was found by the Attorney General and Director of the Census to have used it in any election on November 1, 1964, and in which less than 50% of the residents of voting age were registered and had voted.[10] Gaston County, North Carolina, was so classified and its literacy test was thereupon suspended. In a suit to remove the ban we sustained it. We noted that Congress had concluded that "the County deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test." *Id.*, at 291. Congress, it was argued, should have employed a formula based on educational disparities between the races or one based on literacy rates. *Id.*, at 292. But the choice of appropriate remedies is for Congress and the range of available ones is wide. It was not a defect in the formula that some literate Negroes would be turned out by Negro schools.

> "It is only reasonable to infer that among black children compelled to endure a segregated and in-

[10] The constitutionality of that procedure has been sustained in *South Carolina* v. *Katzenbach*, 383 U. S. 301.

ferior education, fewer will achieve any given degree of literacy than will their better-educated white contemporaries. And on the Government's showing, it was certainly proper to infer that Gaston County's inferior Negro schools provided many of its Negro residents with a subliterate education, and gave many others little inducement to enter or remain in school." *Id.*, at 295–296.

By like reasoning Congress in the present legislation need not make findings as to the incidence of literacy. It can rely on the fact that most States do not have literacy tests, that the tests have been used at times as a discriminatory weapon against some minorities—not only Negroes but Americans of Mexican ancestry, and American Indians; that radio and television have made it possible for a person to be well informed even though he may not be able to read and write. We know from the legislative history that these and other desiderata influenced Congress in the choice it made in the present legislation; and we certainly cannot say that the means used were inappropriate.

Residence. The residence requirements of § 202 relate only to elections for President and Vice President. Section 202 abolishes durational residency [11] and provides

[11] This Court upheld durational residency requirements as applied in presidential and vice presidential elections absent an Act of Congress. See *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd 380 U. S. 125. Subsequently we vacated as moot a case presenting the same question. *Hall* v. *Beals*, 396 U. S. 45. The district courts have been faced with the issue of durational residency requirement as they would be applied to congressional elections. Two have concluded the requirement is constitutional. *Sirak* v. *Brown*, — F. Supp. — (ED Ohio 1970); *Cocanower* v. *Marston*, — F. Supp. — (D. Ariz. 1970). Additionally one other court has refused a preliminary injunction in a case presenting the issue. *Piliavine* v. *Hoel*, — F. Supp. — (WD Wis. 1970). Some district courts, however, believe that *Drueding* cannot stand (absent an Act of Congress) after *Carrington* v. *Rash*, 380 U. S. 89; *Kramer* v. *Union School District*, 395 U. S. 621; *Cipriano* v.

for absentee voting provided that registration may be required 30 days prior to the election. The effect of § 202 is to reduce all state durational residency requirements to 30 days.

In presidential elections no parochial interests of the state, county, or city are involved. Congress found that a durational residency requirement "in some instances has the impermissible purpose or effect of denying citizens the right to vote." § 202 (a)(4). It found in § 202 (a)(3) that a durational residency requirement denies citizens their privileges and immunities.[12]

The Seventeenth Amendment states that Senators shall be "elected by the people." Article I, § 2, provides that the House shall be chosen "by the People of the several States." The right to vote for national officers is a privilege and immunity of national citizenship. *Ex parte Yarbrough*, 110 U. S. 651; *In re Quarles*, 158 U. S. 523, 534; *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Burroughs* v. *United States*, 290 U. S. 534; *United States* v. *Classic*, 313 U. S. 299, 315.[13]

City of Houma, 395 U. S. 701, and *Phoenix* v. *Kolodziejski*, 399 U. S. 204. Accordingly they have held durational residency requirements for congressional elections (and by implication presidential elections) violate the Equal Protection Clause. See *Burg* v. *Canniffee*, 315 F. Supp. 380 (D. Mass. 1970); *Ellington* v. *Blumstein*, — F. Supp. (MD Tenn. 1970); *Hadnott* v. *Amos*, — F. Supp. — (MD Ala. 1970); *Bufford* v. *Holton*, — F. Supp. — (ED Vir. 1970).

In none of these cases was an Act of Congress involved.

[12] Article IV, § 2 of the Constitution provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fourteenth Amendment provides in § 1 that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[13] The cases relied on by my Brother HARLAN, *post*, at —, are not to the contrary. *Snowden* v. *Hughes*, 321 U. S. 1, 6–7, states "The right to become a candidate for *state* office, like the right to

The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Durational residency laws of the States had such effect, says Congress. The "choice of means" to protect such a privilege presents "a question primarily addressed to the judgment of Congress." *Burroughs* v. *United States*, *supra*, at 547. The relevance of the means which Congress adopts to the condition sought to be remedied,

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vote for the election of *state* officers, . . . is a right or privilege of state citizenship." (Emphasis added.) Arguably *Minor* v. *Happersett*, 21 Wall. 162, is to the contrary, but to the extent its dicta indicated otherwise, it was limited in *Ex parte Yarbrough*. *Breedlove* v. *Suttles*, 302 U. S. 277, overruled by *Harper* v. *Virginia Board*, 383 U. S. 663, involved a poll tax applied in both federal and state elections; it erroneously cited *Yarbrough* for the proposition voting is not a privilege and immunity of national citizenship. *Pope* v. *Williams*, 193 U. S. 621, involved durational residency requirements, but expressly reserved the question of their application to presidential and vice presidential elections. Our holdings concerning privileges and immunities of national citizenship were analyzed less than five years ago by my Brother HARLAN. After referring to *Ex parte Yarbrough*, and *United States* v. *Classic*, he stated that those cases "are essentially concerned with the vindication of important relationships with the Federal Government—*voting in federal elections*, involvement with federal law enforcement, comunicating with the Federal Government." *United States* v. *Guest*, 383 U. S. 745, 772 (concurring opinion) (emphasis added).

Contrary to the suggestion of my Brother HARLAN, *post*, at —, we need not rely on the power of Congress to declare the meaning of § 1 of the Fourteenth Amendment. This Court had determined that voting for national officers is a privilege and immunity of national citizenship. No congressional declaration was necessary. Congressional power under § 5 of the Fourteenth Amendment is, as stated, buttressed by congressional power under the Necessary and Proper Clause. Thus even if the durational residency requirements do not violate the Privileges and Immunities Clause, Congress can determine that it is necessary and proper to abolish them in national elections to effectuate and further the purpose of § 1 as it has been declared by this Court.

the degree of their necessity, and the extent of their efficacy are all matters for Congress. *Id.*, at 548.

The judgment which Congress has made respecting the ban of durational residency in presidential elections is plainly a permissible one in its efforts under § 5 to "enforce" the Fourteenth Amendment.

APPENDIX TO OPINION OF DOUGLAS, J.

Cases which have struck down state statutes under the Equal Protection Clause other than statutes which discriminate on the basis of race.

Statutes Which Discriminated Against Certain Businesses

Gulf, C. & S. F. Co. v. *Ellis*, 165 U. S. 150; *Atchison & Santa Fe Ry.* v. *Vosburg*, 238 U. S. 56 (railroad must pay attorney fees if loses suit, but other businesses need not). *Kentucky Finance Co.* v. *Paramount Auto Exchange*, 262 U. S. 544; *Power Co.* v. *Saunders*, 274 U. S. 490 (burdens placed upon out-of-state corporations in litigation).

Statutes Which Favored Certain Business

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540 (exemption from state antitrust law for agricultural goods); *Smith* v. *Cahoon*, 283 U. S. 553 (act exempting certain motor vehicles from insurance requirements); *Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266 (act allowing certain milk dealers to sell at lower than the regulated price); *Hartford Co.* v. *Harrison*, 301 U. S. 459 (statute permitting mutual, but not stock, insurance companies to act through salaried representatives), and *Morey* v. *Dowd*, 354 U. S. 457 (American Express exempted from licensing requirements applied to "currency exchanges").

Taxing Statutes Struck Down

Concordia Ins. Co. v. *Illinois*, 292 U. S. 535; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239; *Cumberland Coal* v. *Board*, 284 U. S. 23; *Quaker City Cab. Co.* v. *Pennsylvania*, 277 U. S. 389; *Louisville Gas* v. *Coleman*, 277 U. S. 32, *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Sioux City Bridge*

v. *Dakota County*, 260 U. S. 441; *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, and *Southern Railway* v. *Greene*, 216 U. S. 400.

TREATMENT OF CONVICTED CRIMINALS

Rinaldi v. *Yeager*, 384 U. S. 305 (statute requiring unsuccessful criminal appellants who were in jail to pay cost of trial transcript); *Baxstrom* v. *Herold*, 383 U. S. 107 (statute denying convict a santity hearing before a jury prior to civil commitment); and *Skinner* v. *Oklahoma*, 316 U. S. 535 (sterilization of some convicts).

INDIGENTS

Douglas v. *California*, 372 U. S. 353 (Rule of Criminal Procedure which did not provide counsel for appeal to indigents); and *Shapiro* v. *Thompson*, 394 U. S. 618 (denial of welfare benefits based on residency requirement).

LEGITIMACY

Glona v. *American Guarantee*, 391 U. S. 73 (mother denied right to sue for wrongful death of illegitimate child); and *Levy* v. *Louisiana*, 391 U. S. 68 (illegitimate children denied recovery for wrongful death of mother).

ALIENS

Truax v. *Raich*, 239 U. S. 33 (statute limiting the number of aliens that could be employed to 20%); and *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (denial of fishing rights to aliens ineligible for citizenship).

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—October Term, 1970

43	State of Oregon, Plaintiff, *v.* John N. Mitchell, Attorney General of the United States.	On Bills of Complaint.
44	State of Texas, Plaintiff, *v.* John N. Mitchell, Attorney General of the United States.	
46	United States, Plaintiff, *v.* State of Arizona.	
47	United States, Plaintiff, *v.* State of Idaho.	

[December 21, 1970]

Mr. Justice Harlan, concurring in part and dissenting in part.

From the standpoint of this Court's decisions during an era of judicial constitutional revision in the field of the suffrage, ushered in eight years ago by *Baker* v. *Carr*, 369 U. S. 186 (1962), I would find it difficult not to sustain all three aspects of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, here challenged. From the standpoint of the bedrock of the constitutional structure of this Nation, these cases bring us to a crossroad that is marked with a formidable "Stop" sign. That sign compels us to pause before we allow those decisions to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation, and to consider whether

sound doctrine does not in truth require us to hold that one or more of the changes which Congress has thus sought to make can be accomplished only by constitutional amendment.

The four cases require determination of the validity of the Voting Rights Act Amendments in three respects. In Nos. 43 and 44, Oregon and Texas have sought to enjoin the enforcement of § 302 of the Act as applied to lower the voting age in those States from 21 to 18.[1]

In Nos. 46 and 47 the United States seeks a declaration of the validity of the Act and an injunction requiring Arizona and Idaho to conform their laws to it. The Act would lower the voting age in each State from 21 to 18. It would suspend until August 6, 1975, the Arizona literacy test, which requires that applicants for registration be able to read the United States Constitution in English and write their names. It would require Idaho to make several changes in its laws governing residency, registration, and absentee voting in presidential elections. Among the more substantial changes, Idaho's present 60-day state residency requirement will in effect be lowered to 30 days; its 30-day county residency requirement for intrastate migrants will be abolished; Idaho will have to permit voting by citizens of other States formerly domiciled in Idaho who emigrated too recently to register in their new homes; and it must permit absentee registration and voting by persons who have lived in Idaho for less than six months. The

[1] The Attorney General of the United States, a citizen of New York, is named as defendant. The jurisdictional basis alleged is Art. III, § 2, which gives this Court original jurisdiction over controversies between a State and a citizen of another State. We held a similar suit justiciable and otherwise within our original jurisdiction in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 307 (1966). The parties have not asked us to reexamine the validity of that ruling, and since the Court has not undertaken to do so, I am content to sustain jurisdiction on the authority of that decision.

relevant provisions of the Act and of the constitutions and laws of the four States are set out in an Appendix to this opinion.

Each of the States contests the power of Congress to enact the provisions of the Act involved in its suit.[2] The Government places primary reliance on the power of Congress under § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate legislation. For reasons to follow, I am of the opinion that the Fourteenth Amendment was never intended to restrict the authority of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications, in either state or federal elections. I find no other source of congressional power to lower the voting age as fixed by state laws, or to alter state laws on residency, registration, and absentee voting, with respect to either state or federal elections. The suspension of Arizona's literacy requirement, however, can be deemed an appropriate means of enforcing the Fifteenth Amendment, and I would sustain it on that basis.

I

It is fitting to begin with a quotation from one of the leading members of the 39th Congress, which proposed the Fourteenth Amendment to the States in 1866:

> "Every Constitution embodies the principles of its framers. It is a transcript of their minds. If its meaning in any place is open to doubt, or if words are used which seem to have no fixed signification, we cannot err if we turn to the framers; and their authority increases in proportion to the evidence

[2] In response to inquiries from the Attorney General, Arizona, Oregon, and Texas indicated willingness to abide by § 202 of the Act, governing residency, registration, and absentee voting in presidential elections and to conform conflicting state laws.

which they have left on the question." Cong. Globe, 39th Cong., 1st Sess. 677 (1866) (Senator Sumner).

Believing this view to be undoubtedly sound, I turn to the circumstances in which the Fourteenth Amendment was adopted for enlightenment on the intended reach of its provisions. This, for me, necessary undertaking has unavoidably led to an opinion of more than ordinary length. Except for those who are willing to close their eyes to constitutional history in making constitutional interpretations or who read such history with a preconceived determination to attain a particular constitutional goal, I think that the history of the Fourteenth Amendment makes it clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment.

A. Historical Setting [3]

The point of departure for considering the purpose and effect of the Fourteenth Amendment with respect to the suffrage should be, I think, the pre-existing provisions of the Constitution. Article I, § 2, provided that in determining the number of Representatives to which a State was entitled, only three-fifths of the slave population should be counted.[4] The section also provided

[3] The account in the text is largely drawn from J. James, The Framing of the Fourteenth Amendment (1956) (hereafter James), and to some extent from W. Gillette, The Right To Vote: Politics and the Passage of the Fifteenth Amendment (1969) (hereafter Gillette), and B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914) (hereafter Kendrick), as well.

[4] "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

that the qualifications of voters for such Representatives should be the same as those established by the States for electors of the most numerous branch of their respective legislatures. Article I, § 4, provided that, subject to congressional veto, the States might prescribe the times, places, and manner of holding elections for Representatives. Article II, § 1, provided that the States might direct the manner of choosing electors for President and Vice President, except that Congress might fix a uniform time for the choice.[5] Nothing in the original Constitution controlled the way States might allocate their political power except for the Guaranty of a Republican Form of Government, which appears in Article IV, § 4.[6] No relevant changes in the constitutional structure were made until after the Civil War.

At the close of that war, there were some four million freed slaves in the South, none of whom were permitted to vote. The white population of the Confederacy had been overwhelmingly sympathetic with the rebellion. Since there was only a comparative handful of persons in these States who were neither former slaves nor Confederate sympathizers, the place where the political power should be lodged was a most vexing question. In a series of proclamations in the summer of 1865, President Andrew Johnson had laid the groundwork for the States to be controlled by the white populations which had held power before the war, eliminating only the leading rebels and those unwilling to sign a loyalty oath.[7] The Radicals, on the other hand, were ardently in favor of Negro

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[5] See p. —, *post*, for the text of these provisions, and for discussion of the contention that they empower Congress to set qualifications of voters in federal elections.

[6] "The United States shall guarantee to every State in this Union a Republican Form of Government."

[7] *E. g.*, Proclamation of May 29, 1865, 13 Stat. 760 (North Carolina).

suffrage as essential to prevent resurgent rebellion, requisite to protect the freedmen, and necessary to ensure continued Radical control of the government. This ardor cooled as it ran into northern racial prejudice. At that time, only six States—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and New York—permitted Negroes to vote, and New York imposed special property and residency requirements on Negro voters.[8] In referenda late that year, enfranchising proposals were roundly beaten in Connecticut, Wisconsin, Minnesota, the Territory of Colorado, and the District of Columbia. Gillette, *supra*, n. 3, at 25–26. Such popular rebuffs led the Radicals to pull in their horns and hope for a protracted process of reconstruction during which the North could be educated to the advisibility of Negro suffrage, at least for the South. In the meantime, of course, it would be essential to bar southern representation in Congress lest a combination of southerners and Democrats obtain control of the government and frustrate Radical goals.

The problem of congressional representation was acute. With the freeing of the slaves, the Three-Fifths Compromise ceased to have any effect. While predictions of the precise effect of the change varied with the person doing the calculating, the consensus was that the South would be entitled to at least 15 new members of Congress, and, of course, a like number of new presidential electors. The Radicals had other rallying cries which they kept before the public in the summer of 1865, but one

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[8] The texts of the state constitutions are most readily available in F. Thorpe, The Federal and State Constitutions (1909). The qualifications imposed by the various States three years later, when the Fifteenth Amendment was proposed, are presented in tabular form in Hearings on the Voting Rights Bill, S. 1564, Before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 128–129 (1965).

author gives this description of the mood as Congress convened: [9]

> "Of all the movements influencing the Fourteenth Amendment which developed prior to the first session of the Thirty-ninth Congress, that for Negro suffrage was the most outstanding. The volume of private and public comment indicates that it was viewed as an issue of prime importance. The cry for a changed basis of representation was, in reality, subsidiary to this, and was meant by Radicals to secure in another way what Negro suffrage might accomplish for them: removal of the danger of Democratic dominance as a consequence of Southern restoration. The danger of possible repudiation of the national obligations, and assumption of the rebel debt, was invariably presented to show the need for Negro suffrage or a new basis of representation. Sentiment for disqualification of ex-Confederates, though a natural growth, well suited such purposes. The movement to guarantee civil rights, sponsored originally by the more conservative Republicans, received emphasis from Radicals only when state elections indicated that suffrage would not serve as a party platform."

When Congress met, the Radicals, led by Thaddeus Stevens, were successful in obtaining agreement for a Joint Committee on Reconstruction, composed of 15 members, to "inquire into the condition of the States which formed the so-called confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress . . . ." Cong. Globe, 39th Cong., 1st Sess. 30, 47 (1865) (hereafter Globe).

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[9] James 33.

All papers relating to representation of the southern States were to be referred to the Committee of Fifteen without debate. The result, which many had not foreseen, was to assert congressional control over Reconstruction and at the same time to put the congressional power in the hands of a largely Radical secret committee.

The Joint Committee began work with the beginning of 1866, and in due course reported a joint resolution, H. R. No. 51, to amend the Constitution. The proposal would have based representation and direct taxes on population, with a proviso that

> "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." Globe 351.

The result, if the southern States did not provide for Negro suffrage, would be a decrease in southern representation in Congress and the Electoral College by some 24 seats from their pre-war position instead of an increase of 15. The House, although somewhat balky, approved the measure after lengthy debate. Globe 538. The Senate proved more intractable. An odd combination of Democrats, moderate Republicans, and extreme Radicals combined to defeat the measure, with the Radicals basing their opposition largely on the fear that the proviso would be read to authorize racial voter qualifications and thus prevent Congress from enfranchising the freedmen under powers assertedly granted by other clauses of the Constitution. See, *e. g.*, Globe 673–687 (Senator Sumner).

At about this same time the Civil Rights Bill and the Second Freedmen's Bureau Bill were being debated. Both bills provided a list of rights secured, not including voting.[10] Senator Trumbull, who reported the Civil

[10] See Globe 209 (Freedmen's Bureau Bill); Globe 211 (Civil Rights Bill).

Rights Bill on behalf of the Senate Judiciary Committee, stated "I do not want to bring up the question of negro suffrage in the bill." Globe 606. His House counterpart exhibited the same reluctance. Globe 1162 (Cong. Wilson of Iowa). Despite considerable uncertainty as to the constitutionality of the measures, both ultimately passed. In the midst of the Senate debates on the basis of representation, President Johnson vetoed the Freedmen's Bureau Bill, primarily on constitutional grounds. This veto, which was narrowly sustained, was followed shortly by the President's bitter attack on Radical Reconstruction in his Washington's Birthday speech. These two actions, which were followed a month later by the veto of the Civil Rights Bill, removed any lingering hopes among the Radicals that Johnson would support them in a thoroughgoing plan of reconstruction. By the same token they increased the Radicals' need for an articulated plan of their own to be put before the country in the upcoming elections as an alternative to the course the President was taking.

The second major product of the Reconstruction Committee before the resolution which became the Fourteenth Amendment was a proposal to add an equal rights provision to the Constitution. This measure, H. R. No. 63, which foreshadowed § 1 of the Fourteenth Amendment, read as follows:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." Globe 428.

It was reported by Congressman Bingham of Ohio, who later opposed the Civil Rights Bill because he believed it unconstitutional. Globe 1292–1293. The

amendment immediately ran into serious opposition in the House and the subject was dropped.[11]

Such was the background of the Fourteenth Amendment. Congress, at loggerheads with the President over Reconstruction, had not come up with a plan of its own after six months of deliberations; both friends and foes prodded it to develop an alternative. The Reconstruction Committee had been unable to produce anything which could even get through Congress, much less obtain the adherence of three-fourths of the States. The Radicals, committed to Negro suffrage, were confronted with widespread public opposition to that goal and the necessity for a reconstruction plan that could do service as a party platform in the elections that fall. The language of the Fourteenth Amendment must be read with awareness that it was designed in response to this situation.

B. The Language of the Amendment and Reconstruction Measures

Sections 1 and 2 of the Fourteenth Amendment as originally reported read as follows: [12]

> "Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities

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[11] While formally further consideration was postponed until a date in April, six weeks off, Globe 1095, it was generally understood that "April means indefinitely." 2 Nation 289 (March 11, 1866).

[12] The only change made in § 1 was the addition of the Citizenship Clause by the Senate. Globe 3041. The primary change made in § 2 was to condition reduction of representation on denial or abridgement of the right to vote in certain named elections, rather than to speak generally of denial or abridgement of "the elective franchise." *Ibid.* That section now reads:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age." Globe 2286.

In the historical context, no one could have understood this language as anything other than an abandonment of the principle of Negro suffrage, for which the Radicals had been so eager. By the same token, the language could hardly have been understood as affecting the provisions of the Constitution placing voting qualifications in the hands of the States. Section 1 must have been seen as little more than a constitutionalization of

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and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

the 1866 Civil Rights Act, concededly one of the primary goals of that portion of the Amendment.[13]

While these conclusions may, I think, be confidently asserted, it is not so easy to explain just how contemporary observers would have construed the three clauses of § 1 to reach this result.[14] No doubt in the case of many congressmen it simply never occurred to them that the States' longstanding plenary control over voter qualifications would be affected without explicit language to that effect. And since no speaker during the debates on the Fourteenth Amendment pursued the contention that § 1 would be construed to include the franchise, those who took the opposite view rarely explained how they arrived at their conclusions.

In attempting to unravel what was seldom articulated, the appropriate starting point is the fact that the Framers of the Amendment expected the most significant portion of § 1 to be the clause prohibiting state

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[13] Section 1 of that Act provided in part that

"all persons . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." Act of Apr. 9, 1866, c. 31, § 1, 14 Stat. 27.

[14] In this connection, Professor Fairman's admonition of 20 years ago is even more forceful than it was when he wrote:

"We know so much more about the constitutional law of the Fourteenth Amendment than the men who adopted it that we should remind ourselves not to be surprised to find them vague where we want them to prove sharp. Eighty years of adjudication has taught us distinctions and subtleties where the men of 1866 did not even perceive the need for analysis." Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 9 (1949).

laws "which shall abridge the privileges and immunities of citizens of the United States." These privileges were no doubt understood to include the ones set out in the first section of the Civil Rights Act. To be prohibited by law from enjoying these rights would hardly be consistent with full membership in a civil society.

The same is not necessarily true with respect to prohibitions on participation in the political process. Many members of Congress accepted the jurisprudence of the day, in which the rights of man fell into three categories: natural, civil, and political. The privileges of citizens, being "civil" rights, were distinct from the rights arising from governmental organization, which were political in character.[15] Others no doubt relied on the experience under the similar language of Article IV, § 2, which had never been held to guarantee the right to vote. The remarks of Senator Howard of Michigan, who as spokesman for the Joint Committee explained in greater detail than most why the Amendment did not reach the suffrage, contain something of each view. See Globe 2766, quoted at p. —, *post;* nn. 56 and 57, *post;* cf. *Baker* v. *McClung*, 172 U. S. 239, 256 (1898) (dictum).

Since the Privileges and Immunities Clause was expected to be the primary source of substantive protection, the Equal Protection and Due Process Clauses were

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[15] See, *e. g.*, Globe 599 (Sen. Trumbull); Globe 1117 (Cong. Wilson of Iowa, quoting Kent's Commentaries and Bouvier's Law Dictionary); Globe 1152 (Cong. Thayer). There were some, however, who considered the distinction either nonexistent or too uncertain to be a basis for legislation. *E. g.*, Globe 477 (Sen. Saulsbury); Globe 1157 (Cong. Thornton); Globe 1292–1293 (Cong. Bingham).

It hardly seems necessary to point out that the jurisprudential concept of "political" as opposed to "civil" or "natural" rights bears no relation to that class of nonjusticiable issues perhaps inappropriately known as "political questions." See the opinion of Mr. Justice Douglas, *ante*, p. —.

relegated to a secondary role, as the debates and other contemporary materials make clear.[16] Those clauses, which appear on their face to correspond with the latter portion of § 1 of the Civil Rights Act, see n. 13, *supra*, and to be primarily concerned with person and property, would not have been expected to enfranchise the freedmen if the Privileges and Immunities Clause did not.

Other members of Congress no doubt saw § 2 of the proposed Amendment as the Committee's resolution of the related problems of suffrage and representation. Since that section did not provide for enfranchisement, but simply reduced representation for disfranchisement, any doubts about the effect of the broad language of § 1 were removed. Congressman Bingham, who was primarily responsible for the language of § 1, stated this view. Globe 2542, quoted at p. —, *post*. Finally, characterization of the Amendment by such figures as Stevens and Bingham in the House and Howard in the Senate, not contested by the Democrats except in passing remarks, was no doubt simply accepted by many members of Congress; they, repeating it, gave further force to the interpretation, with the result that, as will appear below, not one speaker in the debates on the Fourteenth Amendment unambiguously stated that it would affect state voter qualifications, and only three, all opponents of the measure, can fairly be characterized as raising the possibility.[17] Further evidence of this original understanding can be found in later events.

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[16] See generally Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5 (1949), especially at 8–9.

[17] The remarks of these three Democrats, Niblack, Boyer, and Rogers, are discussed at pp. —, *post*. Also discussed there are the remarks of a fourth Democratic Representative, Phelps, which were delivered before the start of debate on the proposed Fourteenth Amendment.

The Thirty-ninth Congress, which proposed the Fourteenth Amendment, also enacted the First Reconstruction Act, c. 153, 14 Stat. 428 (1867). This Act required, as a condition precedent of readmission of the southern States, that they adopt constitutions providing that the elective franchise should be enjoyed by all male citizens over the age of 21 who had been residents for more than one year and were not disfranchised for treason or common-law felony; even so, no State would be readmitted until a legislature elected under the new Constitution had ratified the proposed Fourteenth Amendment and that Amendment had become part of the Constitution.

The next development came when the ratification drive in the North stalled. After a year had passed during which only one northern State had ratified the proposed Fourteenth Amendment, Arkansas was readmitted to the Union by the Act of June 22, 1868, c. 69, 15 Stat. 72. This readmission was based on the "fundamental condition" that the state constitution should not be amended to restrict the franchise, except with reference to residency requirements. Three days later the Act of June 25, 1868, c. 70, 15 Stat. 73, held out a promise of similar treatment to North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida if they would ratify the Fourteenth Amendment. By happy coincidence, the assent of those six States was just sufficient to complete the ratification process. It can hardly be suggested, therefore, that the "fundamental condition" was exacted from them as a measure of caution lest the Fourteenth Amendment fail of ratification.

The Fortieth Congress, not content with enfranchisement in the South, proposed the Fifteenth Amendment

to extend the suffrage to northern Negroes. See Gillette, *supra*, n. 3, at 46. This fact alone is evidence that they did not understand the Fourteenth Amendment to have accomplished such a result. Less well known is the fact that the Fortieth Congress considered and very nearly adopted a proposed amendment which would have expressly prohibited not only discriminatory voter qualifications but discriminatory qualifications for office as well. Each House passed such a measure by the required two-thirds margin. Cong. Globe, 40th Cong., 3d Sess., 1318, 1428 (1869). A conference committee, composed of Senators Stewart and Conkling and Representatives Boutwell, Bingham, and Logan, struck out the office-holding provision, *id.*, at 1563, 1593, and with Inauguration Day only a week away, both Houses accepted the conference report. *Id.*, at 1564, 1641. See generally Gillette 58–77. While the reasons for these actions are unclear, it is unlikely that they were provoked by the idea that the Fourteenth Amendment covered the field; such a rationale seemingly would have made the enfranchising provision itself unnecessary.

The Forty-first Congress readmitted the remaining three States of the Confederacy. The admitting act in each case recited good-faith ratification of the Fourteenth and Fifteenth Amendments, and imposed the fundamental conditions that the States should not restrict the elective franchise [18] and "That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or pre-

[18] While this provision might seem useless in light of the Fifteenth Amendment, it was doubtless intended to prohibit the imposition of property or literacy qualifications which, even though fairly applied, would have the effect of disfranchising most of the Negroes. The Radicals had sought to prohibit such qualifications in the Fifteenth Amendment, but were unsuccessful. See Gillette 53, 56–62, 69–72, 76.

vious condition of servitude, of the right to hold office under the constitution and laws of said State." Act of Jan. 26, 1870, c. 10, 16 Stat. 63 (Virginia); Act of Feb. 23, 1870, c. 19, 16 Stat. 68 (Mississippi); Act of Mar. 30, 1879, c. 39, 16 Stat. 81 (Texas).

These materials demonstrate not only that § 1 of the Fourteenth Amendment is susceptible of an interpretation that it does not reach suffrage qualifications, but that this is the interpretation given by the immediately succeeding Congresses. Such an interpretation is the most reasonable reading of the section in view of the background against which it was proposed and adopted, particularly the doubts about the constitutionality of the Civil Rights Act, the prejudice in the North against any recognition of the principle of Negro suffrage, and the basic constitutional structure of leaving suffrage qualifications with the States.[19] If any further clarification were

[19] While the history indicates that the supporters of the Fourteenth Amendment would have been surprised at the suggestion that the Amendment brought qualifications for state office under federal supervision, office-holding was not the focus of attention during the consideration of the Amendment. Moreover, state power to set voter qualifications, unlike state power to set qualifications for office, is explicitly recognized not only in the original Constitution but in § 2 of the Fourteenth Amendment itself. Whether these distinctions are sufficient to justify testing state qualifications for office by the Fourteenth Amendment is a matter not presented by these cases.

Where the state action has a racial basis, see *Anderson* v. *Martin*, 375 U. S. 399 (1964), I am not prepared to assume that the Fifteenth Amendment provides no protection. Despite the statement in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, *ante*, p. —, I would find it surprising if a State could undercut the right to vote by taking steps to ensure that all candidates are unpalatable to voters of a certain race. Although an explicit provision on office-holding was deleted from the proposed Fifteenth Amendment at the eleventh hour, the idea that the right to vote without more implies the right to be voted for was specifically referred to by supporters of the Fifteenth Amend-

needed, one would have thought it provided by the second section of the same Amendment, which specifically contemplated that the right to vote would be denied or abridged by the States on racial or other grounds. As a unanimous Court once asked, "Why this, if it was not in the power of the [state] legislature to deny the right of suffrage to some male inhabitants?" *Minor* v. *Happersett*, 88 U. S. (21 Wall.) 162, 174 (1874).

The Government suggests that the list of protected qualifications in § 2 is "no more than descriptive of voting laws as they then stood." Brief for the United States, Nos. 46 and 47, Original, at 75. This is wholly inaccurate. Aside from racial restrictions, all States had residency requirements and many had literacy, property, or taxation qualifications. On the other hand, several of the western States permitted aliens to vote if they had satisfied certain residency requirements and had declared their intention to become citizens.[20] It hardly seems necessary to observe that the politicians who framed the Fourteenth Amendment were familiar with the makeup of the electorate. In any event, the congressional debates contain such proof in ample measure.[21]

Assuming, then, that § 2 represents a deliberate selection of the voting qualifications to be penalized, what is the point of it? The Government notes that "it was intended—although it has never been used—to provide a remedy against exclusion of the newly freed slaves from the vote." Brief for the Defendant, Nos. 43 and 44, Original, at 20. Undoubtedly this was the primary purpose. But the Framers of the Amendment, with

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ment in both Houses of Congress. See Cong. Globe, 40th Cong., 3d Sess., 1425–1426 (1869) (Cong. Boutwell); *id.*, at 1426 (Cong. Butler); *id.*, at 1629 (Sen. Sawyer).

[20] Hearings, *supra* n. 8.

[21] See, *e. g.*, Globe 141–142 (Cong. Blaine); Globe 2766–2767 (Sen. Howard); Globe 2769–2770 (Sens. Wade and Wilson); Globe 3033 (Sen. Henderson).

their attention thus focused on racial voting qualifications, could hardly have been unaware of § 1. If they understood that section to forbid such qualifications, the simple means of penalizing this conduct would have been to impose a reduction of representation for voting discrimination in violation of § 1. Their adoption instead of the awkward phrasing of § 2 is therefore significant.

To be sure, one might argue that § 2 is simply a rhetorical flourish, and that the qualifications listed there are merely the ones which the Framers deemed to be consistent with the alleged prohibition of § 1. This argument is not only unreasonable on its face and untenable in light of the historical record; it is fatal to the validity of the reduction of the voting age in § 302 of the Act before us.

The only sensible explanation of § 2, therefore, is that the racial voter qualifications it was designed to penalize were understood to be permitted by § 1 of the Fourteenth Amendment. The Amendment was a half-way measure, adopted to deprive the South of representation until it should enfranchise the freedmen, but to have no practical effect in the North. It was politically acceptable precisely because of its regional consequences and its avoidance of an explicit recognition of the principle of Negro suffrage. As my Brother BLACK states, "it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves." *Ante*, p. ——. The detailed historical materials make this unmistakeably clear.

C. The Joint Committee

The first place to look for the understanding of the Framers of the Fourteenth Amendment is the Journal of the Joint Committee on Reconstruction.[22] The exact

[22] The Journal is reprinted in Kendrick, *supra* n. 3, at 37–129.

sequence of the actions of this Committee presumably had little or no effect on the members of Congress who were not on the Committee, for the Committee attempted to keep its deliberations secret,[23] and the Journal itself was lost for nearly 20 years.[24] Nevertheless the Journal, although only a record of proposals and votes, illustrates the thoughts of those leading figures of Congress who were members and participated in the drafting of the Amendment.

Two features emerge from such a review with startling clarity. First the Committee regularly rejected explicitly enfranchising proposals in favor of plans which would postpone enfranchisement, leave it to congressional discretion, or abandon it altogether. Second, the abandonment of Negro suffrage as a goal exactly corresponded with the adoption of provisions to reduce representation for discriminatory restrictions on the ballot.

This correspondence was present from the start. Five plans were proposed to deal with representation. One would have prohibited racial qualifications for voters and based representation on the whole number of citizens in the State; the other four proposals contained no enfranchising provision but in various ways would have reduced representation for States where the vote was racially restricted. Kendrick 41–44. A subcommittee reduced the five proposals to two, one prohibiting discrimination and the other reducing representation where it was present. On Stevens' motion the latter alternative was accepted by a vote of 11 to 3; Kendrick 51; with minor changes it was subsequently reported as H. R. No. 51.

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[23] The attempts were not altogether successful. See James 108–109.

[24] See generally Kendrick 18–22. For reasons to be developed below, *post*, p. —, the report of the Joint Committee, H. R. Rep. No. 30, 39th Cong., 1st Sess. (1866), is less useful as an indication of the understanding of the Committee and the Congress than as an indication of the understanding of the ratifying States.

The subcommittee also proposed that whichever provision on the basis of representation was adopted, the Congress should be empowered to legislate to secure all citizens "the same political rights and privileges" and also "equal protection in the enjoyment of life, liberty and property." Kendrick 51. After the Committee reported H. R. No. 51, it turned to consideration of this proposal. At a meeting attended by only 10 members, a motion to strike out the clause authorizing Congress to legislate for equal political rights and privileges lost by a vote of six to four. Kendrick 57. At a subsequent meeting, however, Bingham had the subcommittee proposal replaced with another which did not mention *political* rights and privileges, but was otherwise quite similar. Kendrick 61; see the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL, *ante*, p. —, for the text of the two provisions. The Committee reported the substitute as H. R. No. 63. In the House so much concern was expressed over the centralization of power the amendment would work—a few said it would even authorize Congress to regulate the suffrage—that the matter was dropped. *Ante*, p. —.

The Fourteenth Amendment had as its most direct antecedent a proposal drafted by Robert Dale Owen, who was not a member of Congress, and presented to the Joint Committee by Stevens.[25] Originally the plan provided for mandatory enfranchisement in 1876 and for reduction of representation until that date. Kendrick 82–84. However, Stevens was pressured by various congressional delegations who wanted nothing to do with Negro suffrage, even at a remove of 10 years.[26] He therefore successfully moved to strike out the enfranchising

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[25] Owen's account of the Fourteenth Amendment is given in Political Results from the Varioloid, 35 Atlantic Monthly 660 (June 1875).

[26] See James 109–112; Gillette 24; Owen, *supra* n. 25, at 666.

provision and correspondingly to abolish the 10-year limitation on reduction of representation for racial discrimination. The motion carried by a vote of 12 to 2. Kendrick 101.

Bingham was then successful in replacing § 1 of Owen's proposal, which read

> "No discrimination shall be made by any State, or by the United States, as to the civil rights of persons, because of race, color or previous condition of servitude"

with the following now-familiar language:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Kendrick 106.

The summary style of the Journal leaves unclear the reasons for the change. However, Bingham himself had rather consistently voted against proposals for direct and immediate enfranchisement,[27] and on the face of things

[27] See the votes on Stevens' motion to select the alternative which reduced representation rather than that which prohibited racial restrictions on the ballot, Kendrick 52; Boutwell's motion to condition readmission of Tennessee on that State's agreement not to discriminate in its voter qualifications, Kendrick 70; Stevens' motion to strike out the provision of the Owen plan enfranchising Negroes after 1876, Kendrick 101; and the motion to condition readmission of Tennessee and Arkansas on their having provided impartial male suffrage, as well as on conforming their laws and constitutions to the requirements of the proposed amendment (which included Bingham's provision when this motion was made), Kendrick 109.

Bingham was not, however, wholly opposed to Negro suffrage. As chairman of the subcommittee, he reported the equal rights provision which would have empowered Congress to provide for equal

it seems unlikely that the other members of the Joint Committee understood his provision to be an enfranchising proposal.[28] That they did not so understand is demonstrated by the speeches in the debates on the floor.[29]

Before I examine those debates, a word of explanation is in order. For obvious reasons, the discussions of

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political rights and privileges, Kendrick 56, although he was the one who subsequently had that replaced with the first equal rights provision reported to Congress. Kendrick 61. As already noted, the substitute contained substantially identical language, but omitted reference to political rights and privileges. Bingham also voted for Owen's plan, which would have enfranchised Negroes in 1876, when it was first presented. Kendrick 85. In February 1867 he moved to condition readmission of the southern States on impartial male suffrage as well as on the States' ratifying the Fourteenth Amendment and conforming their laws thereto. Kendrick 123.

[28] While any guess as to the motives of Bingham and the other members of the committee is sheer speculation, it is not necessarily true that they believed they were replacing specific language with general. The author of the original plan, for one, seems to have taken the opposite view. He gave the following characterization of § 1 some years later:

"A declaration who is a citizen: unnecessary, if we had given suffrage to the negro; since there could be no possible doubt that an elector, nativeborn, is a citizen of the United States. Also a *specification* of the *particular* civil rights to be assured: out of place, I think, in a constitutional amendment, though necessary and proper in a civil rights bill." Owen, *supra*, n. 23, at 666 (emphasis added).

[29] The proceedings of the Joint Committee are examined in greater detail in the opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL. *Ante*, p. —. I agree with their apparent conclusion that the Journal sheds little light on the contemporary construction of the Fourteenth Amendment. One is left to do what he can with the two facts noted at the outset of this section: that of the plans considered by the Joint Committee, all provided either for reduction of representation or for enfranchisement while none provided for both at the same time; and that the Committee consistently rejected provisions to enfranchise the freedmen, with the conceivable exception of a plan which was defeated in the House largely because of the scope of the powers it transferred from the States to the Federal Government.

voter qualifications in the Thirty-ninth Congress and among the public were cast primarily in terms of racial disqualifications. This does not detract from their utility as guides to interpretation. When an individual speaker said that the Amendment would not result in the enfranchisement of Negroes, he must have taken one of two views: either the Amendment did not reach voter qualifications at all; or it set standards limiting state restrictions on the ballot, but those standards did not prohibit racial discrimination. I have already set out some of the reasons which lead me to conclude that the former interpretation is correct, and that it is the understanding shared by the Framers of the Amendment, as well as by almost all of the opponents. The mere statement of the latter position appears to me to be a complete refutation of it. Even on its wholly unsupportable assumptions (1) that certain Framers of the Amendment contemplated that the privileges and immunities of citizens included the vote, (2) that they intended to permit state laws to abridge the privileges and immunities of citizens whenever it was rational to do so, and (3) that they agreed on the rationality of prohibiting the freed slaves from voting, this remarkable theory still fails to explain why they understood the Amendment to permit racial voting qualifications in the free States of the North.

D. In Congress

On May 8, 1866, Thaddeus Stevens led off debate on H. R. No. 127, the Joint Resolution proposing the Fourteenth Amendment. After explaining the delay of the Joint Committee in coming up with a plan of reconstruction, he apologized for his proposal in advance:

> "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be con-

> sulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Globe 2459.

In the climate of the times, Stevens could hardly have been understood as referring to anything other than the failure of the measure to make some provision for the enfranchisement of the freedmen. However, lest any mistake be made, he recounted the history of the Committee's prior effort in the field of representation and suffrage, H. R. No. 51, which "would surely have secured the enfranchisement of every citizen at no distant period." That measure was dead, "slaughtered by a puerile and pedantic criticism," and "unless this (less efficient, I admit) shall pass, its death has postponed the protection of the colored race perhaps for ages." *Ibid.*

With this explanation made, Stevens turned to a section-by-section study of the proposed resolution. The results to be achieved by § 1, as he saw it, would be equal punishment for crime, equal entitlement to the benefits of "[w]hatever law protects the white man," equal means of redress, and equal competence to testify. *Ibid.* If he thought the section provided equal access to the polls, despite his immediately preceding apology for the fact that it did not, his failure to mention that application is remarkable.[30]

Turning then to § 2, Stevens again discussed racial qualifications for voting. He explained the section as follows:

> "If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision

[30] Unless, of course, one adopts a "conspiracy theory" of the history of the Fourteenth Amendment. Thus far no one has (quite) done so in this context.

> will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive." *Ibid.*

Stevens recognized that it might take several years for the coercive effect of the Amendment to result in Negro suffrage, but since this would give time for education and enlightenment of the freedmen, "That short delay would not be injurious." *Ibid.* He did not indicate that he believed it would be unconstitutional. He admitted that § 2 was not so good as the proposal which had been defeated in the Senate, for that, by reducing representation by all the members of a race if any one was discriminated against, would have hastened full enfranchisement. Section 2 allowed proportional credit. "But it is a short step forward. The large stride which we in vain proposed is dead . . . ." Globe 2460.

I have dealt at length with Stevens' remarks because of his prominent position in the House and in the Joint Committee. The remaining remarks, except for Bingham's summation, can be treated in more summary fashion. Of the supporters of the Amendment, Garfield of Ohio,[31] Kelley of Pennsylvania,[32] Boutwell of

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[31] "I regret more than I shall be able to tell this House that we have not found the situatiou [*sic*] of affairs in this country such, and the public virtue such that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." Globe 2462.

[32] "I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country." Globe 2469.

"So far as I am individually concerned, I object to the amendment as a whole because it does not go far enough and propose to at once enfranchise every loyal man in the country." *Ibid.*

Massachusetts (a member of the Joint Committee),[33] Eliot of Massachusetts,[34] Beaman of Michigan,[35] and Farnsworth of Illinois,[36] expressed their regret that the

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[33] "The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country—and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people—I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation." Globe 2508.

[34] "The second section, Mr. Speaker, is, in my judgment, as nearly correct as it can be without being fully, in full measure, right. But one thing is right, and that is secured by the amendment. Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, ultimately recognized and admitted." Globe 2511.

[35] "I did hope to see the rights of the freedmen completely established. . . . I did hope . . . that we should have the manhood and magnanimity to declare that men who have wielded the sword in defense of their country are fit to be intrusted with the ballot. But I am convinced that my expectations, hitherto fondly cherished, are doomed to some disappointment." Globe 2537.

[36] "This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of uni-

Amendment did not prohibit restrictions on the franchise. As the quotations set out in the margin indicate, the absence of such a prohibition was generally attributed to prejudice in the Congress, in the States, or both, to such an extent that an enfranchising amendment could not pass. This corresponds with the first part of Stevens' introductory speech.

Other supporters of the Amendment obviously based their remarks on their understanding that it did not affect state laws imposing discriminatory voting qualifications, but did not indicate that the omission was a drawback in their view. In this group were Thayer of Pennsylvania,[37] Broomall of Pennsylvania,[38] Raymond of New York,[39] McKee of Kentucky,[40] Miller of Pennsyl-

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versal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best." Globe 2540.

[37] "[If the freed slaves had been added] to the thinking, voting men of the southern States, it would be just and proper that that addition should be represented in this body. But we all know that such is not the case. In those States themselves the late slaves do not enter into the basis of local representation. . . .

"Would it not be a most unprecedented thing that when this population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here . . . ." Globe 2464.

[38] "The second proposition is, in short, to limit the representation of the several States as those States themselves shall limit suffrage. . . .

". . . And why not? If the negroes of the South are not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union? If they are not to be counted as against the southern people themselves, why should they be counted against us?" Globe 2498.

[39] H. R. No. 51 "deprived [the southern States] of all inducement for [the] gradual admission [of the freedmen] to the right of suffrage, inasmuch as it exacted universal suffrage as the only condition upon which they should be counted in the basis of representation at all. . . . I voted against a proposition which seemed to me so

[*Footnote 40 on page 29*]

vania,[41] Banks of Massachusetts,[42] and Eckley of Ohio.[43]

The remaining members of the House who supported the Fourteenth Amendment either did not speak at all

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unjust and so injurious, not only to the whites of the southern States, but to the colored race itself. Well, sir, that amendment was rejected in the Senate, and the proposition, as embodied in the committee's report, comes before us in a very different form. It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union. And as I believe that to be essentially just, and likely to remedy the unequal representation of which complaint is so justly made, I shall give it my vote." Globe 2502.

Later, in discussion of § 3, which at that time would have disfranchised certain rebels in federal elections, Raymond remarked that the effect would be to allow "one fifth, one eighth, or one tenth, as the case may be, of the people of these southern States to elect members from those States, to hold seats upon this floor." *Ibid.* It is obvious that the possibility of Negroes' voting in these elections did not cross his mind.

[40] "But this House is not prepared to enfranchise all men; the nation, perhaps, is not prepared for it to-day; the colored race are not prepared for it, probably, and I am sure the rebels are unfit for it; and as Congress has not the moral courage to vote for it, then put in this provision which cuts off the traitor from all political power in the nation, and then we have secured to the loyal men that control which they so richly deserve." Globe 2505.

[41] "This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age." Globe 2510.

[42] "I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have not doubt that the Government of the United States has the authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this

[*Footnote 43 on page 30*]

or did not address themselves to the suffrage issue in any very clear terms. Those in the latter group who gave speeches on the proposed Amendment included Spalding of Ohio,[44] Longyear of Michigan,[45] and Shellabarger of Ohio.[46] The remaining Republican members of the Joint Committee—Washburne of Illinois, Morrill of Vermont, Conkling of New York, and Blow of Mis-

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precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion." Globe 2532.

[43] "If South Carolina persists in withholding the ballot from the colored man, then let her take the alternative we offer, of confining her to the white basis of representation . . . ." Globe 2535.

[44] Spalding's speeches are given at Globe 2509–2510. His only remarks addressed to §§ 1 and 2 read:

"As to the first measure proposed, a person may read it five hundred years hence without gathering from it any idea that this rebellion ever existed. The same may be said of the second proposition, for it only proposes that, the bondsmen being made free, the apportionment of Representatives in Congress shall be based upon the whole number of persons who exercise the elective franchise, instead of the population." Globe 2509.

A month later, in the debate over the Amendment when it had returned from the Senate, Spalding expressed his views more clearly: "I say, as an individual, that I would more cheerfully give my vote if that provision allowed all men of proper age whom we have made free to join in the exercise of the right of suffrage in this country. But if I cannot obtain all that I wish, I will go heartily to secure all we can obtain." Globe 3146.

[45] Longyear's speech is published at Globe 2536–2537. He did not in terms address himself to any section except the third. However, it is not difficult to read his statement that the proposals of the Joint Committee disappointed "the expectations of the people" and his personal hopes as having reference to the absence of any provision on suffrage.

[46] Shellabarger spoke only briefly, and this in connection with the disfranchising section. In the course of his remarks he expressed the view that congressional power to regulate voter qualifications in federal elections was granted by Article I, § 4. Globe 2512.

souri—did not participate in the debates over the Amendment.

In the opposition to the Amendment were only the handful of Democrats. Even they, with one seeming exception, did not assert that the Amendment was applicable to suffrage, although they would have been expected to do so if they thought such a reading plausible. Finck of Ohio and Shanklin of Kentucky did not even mention Negro suffrage in their attacks on the Amendment, although Finck discussed the reasons why the southern States could not be expected to ratify it, Globe 2460–2462, and Shanklin characterized the Amendment as "tyrannical and oppressive." Globe 2501. Eldridge of Wisconsin [47] and Randall of Pennsylvania [48] affirmatively indicated their understanding that with the Amendment the Radicals had at least temporarily abandoned their crusade for Negro suffrage, as did Finck when the measure returned from the Senate with amendments.[49]

The other two Democrats to participate in the three days of debate on H. R. No. 127, Boyer of Pennsyl-

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[47] "Why is it that the gentleman from Pennslyvania [Mr. Stevens] gives up universal suffrage? Why is it that he and other gentlemen give up universal confiscation? Why is it that other gentlemen give up universal butchery of that people? It is a compromise of what they call principle for the purpose of saving their party in the next fall election." Globe 2506.

[48] "Gentlemen here admit that they desire [federal control over suffrage], but that the weak kneed of their party are not equal to the issue. Your purpose is the same, and but for that timidity you would now ingraft negro suffrage upon our Constitution and force it on the entire people of this Union." Globe 2530.

[49] "While this [second] section admits the right of the States thus to exclude negroes from voting, it says to them, if you do so exclude them they shall also be excluded from all representation; and you shall suffer the penalty by loss of representation." Globe 3145.

vania and Rogers of New Jersey, have been a source of great comfort to those who set out to prove that the history of the Fourteenth Amendment is inconclusive on this issue. Each, in the course of a lengthy speech, included a sentence which, taken out of context, can be read to indicate a fear that § 1 might prohibit racial restrictions on the ballot. Boyer said, "The first section embodies the principles of the civil rights bill, and is intended to secure ultimately, and to some extent indirectly, the political equality of the negro race." Globe 2467. Rogers, commenting on the uncertain scope of the Privileges and Immunities Clause, observed "The right to vote is a privilege." Globe 2538.

While these two statements are perhaps innocuous enough to be left alone, it is noteworthy that each speaker had earlier in the session delivered a tirade against the principle of Negro suffrage; [50] if either seriously believed that the Fourteenth Amendment might enfranchise the freedmen, he was unusually calm about the fact. That they did not seriously interpret the Amendment in this way is indicated as well by other portions of their speeches.[51]

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[50] Boyer's speech was made in opposition to a proposal to enfranchise Negroes in the District of Columbia. He then thought Negro suffrage a "monstrous proposition," Globe 176, which was incompatible with "the broad general principle that this is, and of right ought to be, a white man's Government." Globe 175. One of Rogers' harangues on the subject came in connection with the same bill. There he spoke of "the monstrous doctrine of political equality of the negro race with the white at the ballot-box," Globe 198, and launched into an attack remarkable for its vitriol.

[51] Boyer viewed § 3, which at that time would have prohibited voluntary participants in the rebellion from voting in federal elections, as "the most objectionable of all the parts," Globe 2467, as it would disfranchise nine-tenths of the voting population of the South for more than four years. The second section he found objectionable as designed "to reduce the number of southern representatives in

Two other opponents of the Fourteenth Amendment, Phelps of Maryland and Niblack of Indiana, made statements which have been adduced to show that there was no consensus on the applicability of the Fourteenth Amendment to suffrage laws. Phelps voiced his sentiments on May 5, three days before the beginning of debate.[52] In the course of a speech urging a soft policy on reconstruction, he expressed the fear that the Amendment would authorize Congress to define the privileges of citizens to include the suffrage—or indeed that it might have that effect *ex proprio vigore*. Globe 2398. Phelps did not repeat this sentiment after he was contradicted by speaker after speaker during the debates proper; indeed, he did not take part in the debates at all, but

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Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage." Globe 2467. These remarks indicate no awareness that the first section would increase the number of voters in the southern States and also render any "inducement" to Negro suffrage unnecessary.

Rogers later in his speech asserted:

"The committee dare not submit the broad proposition to the people of the United States of negro suffrage. They dare not to-day pass the negro suffrage bill which passed this House in the Senate of the United States because, as I have heard one honorable and leading man on the Republican side of the House say, it would sink into oblivion the party that would advocate before the American people the equal right of the negro with the white man to suffrage." Globe 2538.

When H. R. No. 127 was returned by the Senate with amendments, Rogers addressed the House and stated that when the records of the Joint Committee were made public, it would be revealed that the Committee at first agreed to recommend universal Negro suffrage, but reconsidered because of the force of public opinion. Globe Appendix 230. Rogers was himself a member of the Joint Committee, and he presumably was referring to the acceptance and then rejection of Owen's plan for enfranchisement in 1876.

[52] The Amendment, however, had been released to the press on April 28. James 115.

simply voted against the Amendment, along with most of his Democratic colleagues. Globe 2545.[83]

As for Niblack, on the first day of debate he made the following remarks:

> "I give notice that I will offer the following amendment if I shall have the opportunity:
>
> "Add to the fifth section as follows:
>
> "*Provided,* That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Like Phelps, Niblack found it unnecessary to participate in the debates. He was not heard from again until the vote on the call for the previous question. As Garfield ascertained at the time, the only opportunity to amend H. R. No. 127 would arise if the demand was voted down. Niblack voted to sustain it. Globe 2545.

Debate in the House was substantially concluded by Bingham, the man primarily responsible for the language of § 1. Without equivocation, he stated:

> "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.
>
> "The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Con-

[83] It is not amiss to point out that whatever force Phelps' and Rogers' interpretations may have in the face of the contrary authority, even they foresaw no danger from the Equal Protection Clause as a source of federal power over the suffrage.

stitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." Globe 2542.

Stevens then arose briefly in rebuttal. He attacked Bingham for saying in another portion of his speech that the disqualification provisions of § 3 were unenforceable. He did not contradict—or even refer to—Bingham's interpretation of §§ 1 and 2. Globe 2544. The vote was taken and the resolution passed immediately thereafter. Globe 2545.

To say that Stevens did not contradict Bingham is to minimize the force of the record. Not once, during the three days of debate, did *any* supporter of the Amendment criticize or correct *any* of the Republicans or Democrats who observed that the Amendment left the ballot "exclusively under the control of the States." Globe 2542 (Bingham). This fact is tacitly admitted even by those who find the debates "inconclusive." The only contrary authority they can find in the debates is the pale remarks of the four Democrats already discussed.[54]

In the Senate, which did not have a gag rule, matters proceeded at a more leisurely pace. The introductory speech would normally have been given by Senator Fes-

[54] Like my colleagues, *ante* p. —, I find it difficult to understand what Bingham meant when he said that "the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542. However, I do not find this mysterious sentence to mean that the exercise of the elective franchise is exclusively under the control of the States and Congress, nor do I find it to dilute the force of his explicit statements quoted above that § 1 did not reach the right to vote. The general statements by Bingham and Stevens to the effect that the Amendment was designed to achieve equality before the law, or would be effectuated by legislation in part, likewise do not weaken the force of the statements specifically addressed to the suffrage question quoted above.

senden of Maine, the Chairman of the Joint Committee on behalf of the Senate, but he was still weak with illness and unable to deliver a lengthy speech. The duty of presenting the views of the Joint Committee therefore devolved on Senator Howard of Michigan.[55]

Howard minced no words. He stated that

> "the first section of the proposed amendment does not give to either of the classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [*sic*]." Globe 2766.

"The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Ibid.* Howard stated that while he personally would have preferred to see the freedmen enfranchised, the Committee was confronted with the necessity of proposing an amendment which could be ratified.

> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race." *Ibid.*

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[55] Fessenden, however, was present in the Senate and participated in the discussion. See Globe 2763, 2769, 2770. He was therefore in a position to correct any gross misinterpretation of his views or of those of the Committee.

Howard's forthright attempt to prevent misunderstanding was completely successful insofar as the Senate was concerned; at least, no one has yet discovered a remark during the Senate debates on the proposed Fourteenth Amendment which indicates any contrary impression.[56] For some, however, time has muddied the clarity with which he spoke.[57]

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[56] My colleagues, *ante* p. —, point to Howard's reference to *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3230) (CCED Pa. 1823), in order to "gather some intimation of what probably will be the opinion of the judiciary" on the scope of the Privileges and Immunities Clause of § 1. Globe 2765. As the text indicates, Howard rejected Justice Washington's lengthy dictum insofar as it said that the protected privileges and immunities included "the elective franchise, as regulated and established by the laws or constitution of the State in which it is exercised." No other Senator quoted or referred to this portion of Washington's opinion during the debates over the proposed Fourteenth Amendment. *Corfield*, which held that New Jersey could constitutionally restrict access to her oyster beds to her own residents, was the leading authority on privileges and immunities in the mind of the Thirty-ninth Congress, but it was not the only one. *Campbell* v. *Morriss*, 3 H. & McH. 535 (Md. 1797) (Samuel Chase, J.), and *Abbot* v. *Bayley*, 6 Pick. 89 (Mass. 1827) (Parker, C. J.), were also cited. See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 12–15 (1949). Both specifically stated that the privileges and immunities protected by Article IV, § 2, did not include the right of suffrage or the right to hold office.

[57] Howard was a very clear-spoken man. When it was suggested, during the debates over the Fifteenth Amendment, that the freedmen were entitled to the ballot by virtue of the Privileges and Immunities Clause of the Fourteenth Amendment, he recalled his role in the framing of that Amendment and said "I feel constrained to say that this is the first time it ever occurred to me that the right to vote was to be derived from the fourteenth article. I think such a construction cannot be maintained." Cong Globe, 40th Cong., 3d Sess. 1003 (1869). He then referred to the debates, § 2 of the Fourteenth Amendment, and the fact that "Nobody ever supposed that the right of voting or of holding office was guarantied by the second section of the fourth article of the old Constitution" to bolster his construction of § 1 of the Fourteenth Amendment. *Ibid.*

The Senate, like the House, made frequent reference to the fact that the proposed amendment would not result in the enfranchisement of the freedmen. The supporters who expressed their regret at the fact were Wade of Ohio,[58] Poland of Vermont,[59] Stewart of Nevada,[60] Howe of Wisconsin,[61] Henderson of Mis-

[58] "I think our friends, the colored people of the South, should not be excluded from the right of voting, and they shall not be if my vote and the votes of a sufficient number who agree with me in Congress shall be able to carry it. I do not agree in this particular with the Senator from Michigan [Mr. Howard]. He yields to the provision in the committee's resolution on the subject reluctantly, because he does not believe three fourths of the States can be got to ratify that proposition which is right and just in itself. My own opinion is that if you go down to the very foundation of justice, so far from weakening yourself with the people, you will strengthen yourself immensely by it; but I know that it is not the opinion of many here, and I suppose we must accommodate ourselves to the will of majorities, and if we cannot do all we would, do all we can. I propose for myself to contend for all I can get in the right direction, and finally to go with those who will give us anything that is beneficial." Globe 2769.

[59] "I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of ["the colored people of the South"] and such as had served in our Army. . . . Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further." Globe 2963–2964.

[60] "It declares that all men are entitled to life, liberty, and property, and imposes upon the Government the duty of discharging these solemn obligations, but fails to adopt the easy and direct means for the attainment of the results proposed. It refuses the aid of four million people in maintaining the Government of the people. . . . [But] it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage. . . . The utter impossibility of a final solution of the difficulties by the means proposed will cause the North to clamor for suffrage." Globe 2964.

[61] "I am sorry to have to put that clause [§ 2] into our Constitution, as I am sorry for the necessity which calls upon us to put the preceding clause into the Constitution. I wish there was

souri,[62] and Yates of Illinois.[63] The remarks of Senator Sherman of Ohio, whose support for the amendment was lukewarm, see Globe 2986, seems to have been based on the common interpretation.[64]

Doolittle of Wisconsin, whose support for the President resulted in his virtually being read out of the Republican Party, proposed to base representation on adult male voters. Globe 2942. In a discussion with Senator Grimes of Iowa, a member of the Joint Committee, about the desirability of this change, Doolittle defended himself by pointing out that "Your amendment proposes to

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no community and no State in the United States that was not prepared to say with my friend from Nevada [Mr. Stewart] that all men may be represented in the Congress of the United States and shall be represented and shall choose their own representatives. That is the better doctrine; that is the true doctrine. I would much prefer, myself, to unite with the people of the United States in saying that hereafter no man shall be excluded from the right to vote, than to unite with them in saying that hereafter some men may be excluded from the right of representation." Globe Appendix 219.

[62] Henderson, who had offered a direct enfranchising provision as an alternative to the Committee's first effort in the field of representation, see Globe Appendix 115, stated that he now recognized that "the country is not yet prepared" to share political power with Negroes, and he supported the Committee plan. Globe 3035.

[63] "[A]lthough we do not obtain suffrage now, it is not far off, because the grasping desire of the South for office, that old desire to rule and reign over this Government and control its destinies, will at a very early day hasten the enfranchisement of the loyal blacks." Globe 3038.

[64] "There is no reason why the white citizens of South Carolina should vote the political power of a class of people whom they say are entirely unfit to vote for themselves. If there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them." Globe 2986.

There was no indication that Sherman considered South Carolina's disqualification on racial grounds any more improper than Massachusetts' limitations of the franchise to men, which he mentioned in the next breath.

allow the States to say who shall vote." Globe 2943. Grimes did not respond. Among the Democrats, no different view was expressed. Those whose remarks are informative are Hendricks of Indiana,[65] Cowan of Pennsylvania,[66] Davis of Kentucky,[67] and Johnson of Maryland.[68]

Senator Howard, who had opened debate, made the last remarks in favor of the Amendment. He said:

> "We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate

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[65] "If you think the negro ought to have the right of voting; if you are in favor of it, and intend it shall be given, why do you not in plain words confer it upon them? It is much fairer than to seek it by indirection, and the people will directly understand you when you propose such a change in the Constitution." Globe 2939.

[66] "What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania and you say to her that she must either allow her negroes to vote or have one member of Congress less." Globe 2987.

[67] "[The second section's] true meaning was intended to be difficult to be reached, but when understood it is a measure which shrinks from the responsibility of openly forcing negro suffrage upon the late slave States, but attempts by a great penalty to coerce them to accept it." Globe Appendix 240.

[68] "It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government of the United States will be impotent to redress." Globe 3027. Johnson was the only Democratic Senator on the Joint Committee.

it by any clause of the Constitution of the United States." Globe 3039.

Shortly thereafter the Amendment was approved. Globe 3041–3042.

In the House, there was a brief discussion of the Senate amendments and the measure generally, chiefly by the Democrats. Stevens then concluded the debate as he had begun it, expressing his regret that the Amendment would not enfranchise the freedmen.[69] The House accepted the Senate changes and sent the measure to the States. Globe 3149.

E. Collateral Evidence of Congressional Intent

It has been suggested that despite this evidence of congressional understanding, which seems to me overwhelming, the history is nonetheless inconclusive. Primary reliance is placed on debates over H. R. No. 51, the Joint Committee's first effort in the field of the basis of representation. In these debates, some of the more extreme Radicals, typified by Senator Sumner of Massachusetts, suggested that Congress had power to interfere with state voter qualifications at least to the extent of enfranchising the freedmen. This power was said to exist in a variety of constitutional provisions, including Article I, § 2, Article I, § 4, the war power, the power over territories, the guaranty of a republican form of government, and § 2 of the Thirteenth Amendment. Those who held this view expressed concern lest the Committee's proposal be read to authorize the States to discriminate on racial grounds and stated that they could not vote for the measure if such was the correct construction. They were sometimes comforted by sup-

[69] "With [the rebel States'] enlarged basis of representation, and exclusion of the loyal men of color from the ballot-box, I see no hope of safety unless in the prescription of proper enabling acts, which shall do justice to the freedmen and enjoin enfranchisement as a condition-precedent." Globe 3148.

porters of the committee proposal, who assured them that there would be no such effect. From these statements, and the fact that some of those who took the extreme view ultimately did vote for the proposed Fourteenth Amendment, it is sought to construct a counter-argument: if H. R. No. 51, properly interpreted, would not have precluded congressional exercise of power otherwise existing under the constitutional provisions referred to, then § 2 of the Fourteenth Amendment, properly interpreted, does not preclude the exercise of congressional power under §§ 1 and 5 of that Amendment.

This argument, however, is even logically fallacious, and quite understandably none of the opinions filed today places much reliance on it. I do not maintain that the Framers of the Fourteenth Amendment took away with one hand what they had given with the other, but simply that the Amendment must be construed as a whole, and that for the reasons already given, *ante* p. —, the inclusion of § 2 demonstrates that the Framers never intended to confer the power which my Brethren seek to find in §§ 1 and 5. Bingham, for one, distinguished between these two positions. When it was suggested in the debates over H. R. No. 51 that the proviso would remove preexisting congressional power over voting qualifications, Bingham made the response quoted by my colleagues. Globe 431–432; see pp. —, *ante*. When it was observed during the debates over the proposed Fourteenth Amendment that § 2 demonstrated that the Amendment did not reach state control over voting qualifications, Bingham was the one making the observation. Globe 2542, quoted *ante*, p. —. As Bingham seems to have recognized, the sort of argument he made in connection with H. R. No. 51 is beside the point with respect to the Fourteenth Amendment.

In any event, even disregarding its analytical difficulties, the argument is based on blatant factual shortcomings. All but one of the speakers on whose statements primary reliance is placed stated, either during the de-

bates on the Fourteenth Amendment or subsequently, that the Amendment did not enfranchise the freedmen.[70]

Finally, some of those determined to sustain the legislation now before us rely on speeches made between two and three years after Congress had sent the proposed Amendment to the States. Boutwell and Stevens in the House, and Sumner in the Senate, argued that the Fifteenth Amendment or enfranchising legislation was un-

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[70] Kelley: see Globe 2469, quoted at n. 32, *supra*.

Farnsworth: see Globe 2540, quoted at n. 36, *supra*.

Eliot: see Globe 2511, quoted at n. 34, *supra*.

Higby: see Globe 3978 (debate over readmission of Tennessee despite all-white electorate).

Bingham: see Globe 2542, quoted at p. ——, *supra;* see also Globe 3979 (debate over readmission of Tennessee).

Stevens: see Globe 2459–2460, quoted at pp. ——, *supra;* Globe 3148, quoted at n. 69, *supra*.

Raymond: see Globe 2502, quoted at n. 39, *supra*.

Ashley: see Globe 2882.

Sumner: see n. 71, *infra*.

Fessenden: see H. R. Rep. No. 30, 39th Cong., 1st Sess. XIII–XIV (1866), quoted pp. ——, *infra*.

Yates: see Globe 3038, quoted at n. 63, *supra*.

Stewart: see Globe 2965, quoted at n. 60, *supra*.

Wade: see Globe 2769, quoted at n. 58, *supra*.

The exception is Senator Wilson of Massachusetts, who did not address himself to this issue. However, he participated in the debates, see Globe 2770, 2986–2987, and was therefore in a position to express disagreement with the interpretation uniformly offered in the Senate.

Secondary reliance is placed on Shellabarger, Cook, Boutwell, Julian, and Lawrence of Ohio. These Representatives, with the exception of Boutwell, see n. 33, *supra*, did not participate significantly in the debates over the Fourteenth Amendment. The substance of their earlier remarks is that Congress had some power, usually by way of the Guaranty Clause, see n. 6, *supra*, to oversee state voter qualifications. Shellabarger also relied on Article I, § 4, see n. 46, *supra;* p. ——, *post;* Julian relied on the Thirteenth Amendment; and Boutwell looked to the Declaration of Independence. The relevance of these views to the scope of § 1 of the Fourteenth Amendment is not apparent.

necessary because the Fourteenth Amendment prohibited racial discrimination in voter qualifications. Each had earlier expressed the opposite position.[71] Their subsequent attempts to achieve by assertion what they had not had the votes to achieve by constitutional processes can hardly be entitled to weight.

F. Ratification

State materials relating to the ratification process are not very revealing. For the most part only gubernatorial messages and committee reports have survived.[72] So far as my examination of these materials reveals, while the opponents of the Amendment were divided

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[71] Stevens: see Globe 2459–2460, quoted at pp. —, *supra;* Globe 3148, quoted at n. 69, *supra;* James 163 (campaign speech in fall of 1866).

Boutwell: see Globe 2508, quoted at n. 33, *supra;* Globe 3976 (debate over readmission of Tennessee).

Sumner did not actually participate in the debates on H. R. No. 127. However, after the caucus of Republican Senators had agreed on the form of the Amendment, Sumner gave notice that he intended to move to amend the bill accompanying the proposed Amendment. This bill, S. 292, provided that any Confederate State might be readmitted to representation in Congress once the proposed Amendment had become part of the Constitution and the particular State should have ratified it and modified its constitution and laws in conformity therewith. The bill is reprinted in H. R. Rep. No. 30, 39th Cong., 1st Sess. V–VI, and in Kendrick 117–119. Sumner's amendment would have provided that a State might be readmitted when it should have ratified the Fourteenth Amendment and modified its constitution and laws in conformity therewith "and shall have *further* provided that there shall be no denial of the elective franchise to citizens of the United States because of race or color, and that all persons shall be equal before the law." Globe 2869 (emphasis added).

Sumner also referred to Negro suffrage as unfinished business in speeches that fall. James 173, 178.

[72] For citations to the state materials, see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, 84–132 (1949).

and sometimes equivocal on whether it might be construed to require enfranchisement,[73] the supporters of the Amendment in the States approached the congressional proponents in the unanimity of their interpretation. I have discovered only one brief passage in support of the Amendment which appears to be based on the assumption that it would result in enfranchisement.[74] These remarks, in the message of the Governor of Illinois, had to compete in the minds of the legislators with the viewpoint of the Chicago Tribune. This Radical journal repeatedly criticized the Amendment's lack of an enfranchising provision, and at one time it even expressed the hope that the South would refuse to ratify the Amendment so that the North would turn to enfranchisement of the freedmen as the only means of reconstruction. June 15, 1866, quoted in James 177. In all the other States I have examined, where the materials are sufficiently full for the understanding of a supporter of the Amendment to appear, his under-

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[73] Fear that the Amendment would reach voting was expressed in Brevier Legis. Rep. [Indiana] 45–46, 80, 88–89 (1867); Tenn. H. R. J. 38 (Extra Sess. 1866); Fla. S. J. 102 (1866); N. C. S. J. 96–97 (1866–1867); S. C. H. R. J. 34 (1866); and Tex. S. J. 422–423 (1866). The last four States rejected the proposed Amendment. Opponents of the Amendment stated or assumed that it would not reach voting qualifications in Ark. H. R. J. 288–289 (1866); Fla. S. J. 8–9 (1866); Report of the Joint Committee on Federal Relations, Maryland H. R. Doc. MM at 15 (Mar. 18, 1867); Mass. H. R. Doc. No. 149, at 7–9, 16–17 (1867); and Wis. S. J. 102–103 (1867). Fla. House J. 76–78 (1866); Ind. House J. 102–103 (1867); and N. H. S. J. 71–72 (1866) are equivocal.

[74] "Are not all persons born or naturalized in the United States and subject to its jurisdiction, rightfully citizens of the United States and of each State, and justly entitled to all the political and civil rights citizenship confers? and should any State possess the power to divest them of these great rights except for treason or other infamous crime?" Ill. H. R. J. 40 (1867).

standing has been that enfranchisement would not result.[75]

The scanty official materials can be supplemented by other sources. There was a congressional election in the fall of the year the Fourteenth Amendment went to the States. The Radicals ran on the Amendment as their reconstruction program, attempting to force voters to choose between their plan and that of President Johnson. From the campaign speeches and from newspaper reactions, we can get some further idea of the understanding of the States.

The tone of the campaign was set by the formal report of the Joint Committee, which Fessenden openly stated he had composed as a partisan document. James 147. Indeed, it was not even submitted to Congress until the day the Senate approved the measure, and then only in manuscript form. Globe 3038. On the delicate issue of Negro suffrage, the report read as follows: [76]

> "Doubts were entertained whether Congress had power, even under the amended Constitution, to prescribe the qualifications of voters in a State, or could act directly on the subject. It was doubtful, in the opinion of your committee, whether the States would consent to surrender a power they had always exercised, and to which they were attached. As the best if not the only method of surmounting the difficulty, and as eminently just and proper in itself, your committee came to the conclusion that political power should be possessed in all the States exactly in proportion as the right of suffrage should be granted, without distinction of color or race. This it was thought would leave the whole question

[75] Ind. House J. 47–48 (1867); Kans. S. J. 45 (1867); Maine S. J. 23 (1867); Mass. H. R. Doc. No. 149, at 25–26 (1867); Nev. S. J. App. 9 (1867); Vt. S. J. 28 (1866); W. Va. S. J. 19 (1867); Wis. Assembly J. 33 (1867).

[76] H. R. Rep. No. 30, 39th Cong., 1st Sess. XIII–XIV (1866).

with the people of each State, holding out to all the advantage of increased political power as an inducement to allow all to participate in its exercise. Such a provision would be in its nature gentle and persuasive, and would lead, it was hoped, at no distant day, to an equal participation of all, without distinction, in all the rights and privileges of citizenship, thus affording a full and adequate protection to all classes of citizens, since all would have, through the ballot-box, the power of self-protection.

"Holding these views, your committee prepared an amendment to carry out this idea, and submitted the same to Congress. Unfortunately, as we think, it did not receive the necessary constitutional support in the Senate, and therefore could not be proposed for adoption by the States. The principle involved in that amendment is, however, believed to be sound, and your committee have again proposed it in another form, hoping that it may receive the approbation of Congress."

Newspapers expressed the same view of the reach of the Amendment. Even while deliberations were underway, predictions that Congress would come up with a plan involving enfranchisement of the freedmen had gradually ceased. James 41. When the Amendment was released to the press, Andrew Johnson was reported as seeing in it a "practical abandonment of the Negro suffrage issue." Cincinnati Daily Commercial, April 30, 1866, quoted in James 117. The New York Herald had reported editorially that the Amendment reflected an abandonment of the Radical push for Negro suffrage and acceptance of Johnson's position that control over suffrage rested exclusively with the States. May 1, 1866, reported in James 119. The Nation, a Radical organ, attributed the absence of any provision on Negro suffrage to "sheer want of confidence in the public."

2 Nation 545 (May 1, 1866), quoted in James 120. The Chicago Tribune, another Radical organ, complained that § 1 was objectionable as "surplusage," May 5, 1866, quoted in James 123, and later in the same month criticized the measure for "postponing, not settling" the matter of equal political rights for Negroes. May 31, 1866, quoted in James 146. As deliberations continued, the reporting went on in the same vein. The New York Times reported that with elections approaching, "No one now talks or dreams of forcing Negro suffrage upon the Southern States." June 6, 1866. The Cincinnati Daily Commercial and the Boston Daily Journal for June 7, 1866, commented on the Radicals' abandonment of Negro suffrage. James 145.

Much the same picture emerges from the campaign speeches. Although an occasional Democrat expressed the fear that the Amendment would or might result in political equality,[77] the supporters of the Amendment denied such effects without exception that I have discovered. Among the leading congressional figures who stated in campaign speeches that the Amendment did not prohibit racial voting qualifications were Senators Howe, Lane, Sherman, and Sumner, and Congressmen Bingham, Delano, Schenck, Stevens, and Trumbull. See James 159–168, 173, 178; Fairman, *supra*, 2 Stan. L. Rev., at 70–78.

As was pointed out above, all but a handful of northern States prohibited blacks from voting at all, and opposition to a change was intense. Between 1865 and 1869 referenda on the issue rejected impartial Negro suffrage in Colorado Territory, Connecticut, Wisconsin,

[77] I have found references to only two such speeches, one by Senator Hendricks and the other by one George M. Morgan, a candidate for Congress in Ohio. Cincinnati Commercial, Aug. 9, 1866, at 1, col. 4, quoted in Fairman, *supra* n. ——, at 72; Cincinnati Commercial, Aug. 23, 1866, at 3, col. 2, quoted in Fairman, *supra*, at 75.

Minnesota (twice), the District of Columbia, Nebraska Territory, Kansas, Ohio, Michigan, Missouri, and New York. Only Iowa and Minnesota accepted it, and that on the day Grant was elected to the Presidency.[78] It is inconceivable that those States, in that climate, could have ratified the Amendment with the expectation that it would require them to permit their black citizens to vote.

Small wonder, then, that in early 1869 substantially the same group of men who three years earlier had proposed the Fourteenth Amendment felt it necessary to make further modifications in the Constitution if state suffrage laws were to be controlled even to the minimal degree of prohibiting qualifications which on their face discriminated on the basis of race. If the consequences for our federal system were not so serious, the contention that the history is "inconclusive" would be undeserving of attention. And, with all respect, the transparent failure of attempts to cast doubt on the original understanding is simply further evidence of the force of the historical record.

II

The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts to find a reliable guide to present decision in the pages of the past. Instead there is virtually unanimous agreement, clearly and repeatedly expressed, that § 1 of the Amendment did not reach discriminatory voter qualifications. In this rather remarkable situation, the issue of the bearing of the historical understanding on constitutional interpretation squarely arises.

I must confess to complete astonishment at the position of some of my Brethren that the history of the

[78] See Gillette, *supra* n. 3, at 25–27.

Fourteenth Amendment has become irrelevant. *Ante*, p. —. In the six years since I first set out much of this history,[79] I have seen no justification for such a result which appears to me at all adequate. With matters in this posture, I need do no more by way of justifying my reliance on these materials than sketch the familiar outlines of our constitutional system.

When the Constitution with its original Amendments came into being, the States delegated some of their sovereign powers to the Federal Government, surrendered other powers, and expressly retained all powers not delegated or surrendered. Amend. X. The power to set state voting qualifications was neither surrendered nor delegated, except to the extent that the guaranty of a republican form of government[80] may be thought to require a certain minimum distribution of political power. The power to set qualifications for voters for national office, created by the Constitution, was expressly committed to the States by Article I, § 2, and Article II, § 1.[81] By Article V, States may be deprived of their retained powers only with the concurrence of two-thirds of each House of Congress and three-fourths of the States. No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The existence of the power therefore survived the amend-

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[79] *Reynolds v. Sims*, 377 U. S. 533, 589 (1964) (dissenting opinion).

[80] Art. IV, § 4. See n. 6, *supra*, for the text.

[81] The contention that Congress has power to override state judgments as to qualifications for voting in federal elections is discussed below. Pp. —, *infra*.

ing process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today.[82] Indeed, the very fact that constitutional amendments were deemed necessary to bring about federal abolition of state restrictions on voting by reason of race (Amend. XV), sex (Amend. XIX), and, even with respect to federal elections, the failure to pay state poll taxes (Amend. XXIV), is itself forceful evidence of the common understanding in 1869, 1919, and 1962, respectively, that the Fourteenth Amendment did not empower Congress to legislate in these respects.

It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an

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[82] Amend. XV: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Amend. XIX: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

"Congress shall have power to enforce this article by appropriate legislation."

Amend. XXIV: "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers.[83] This is necessarily so; the federal judiciary, which by express constitutional provision is appointed for life, and therefore cannot be held responsible by the electorate, has no inherent general authority to establish the norms for the rest of society. It is limited to elaboration and application of the precepts ordained in the Constitution by the political representatives of the people. When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.[84]

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[83] See, *e. g.*, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 670 (1966): "Our conclusion, like that in *Reynolds v. Sims*, [377 U. S. 533 (1964),] is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."

[84] Most of the cases in which this Court has used the Equal Protection Clause to strike down state voter qualifications have been decided since 1965. Eight such cases have been decided by opinion. *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Louisiana* v. *United States*, 380 U. S. 145 (1965); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Kramer* v. *Union Free School Dist. No. 15*, 395 U. S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970). Other cases have been summarily disposed of. In none of these cases did the Court advert to the argument based on the historical understanding.

Before 1965, although this Court had occasionally entertained on the merits challenges to state voter qualifications under the Equal Protection Clause, only two cases had sustained the challenges. *Nixon* v. *Herndon*, 273 U. S. 536 (1927), held that a Texas statute limiting participation in the Democratic Party primary to whites violated the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U. S. 73 (1932), held that Texas did not avoid the reach of the *Herndon*

As the Court is not justified in substituting its own views of wise policy for the commands of the Constitution, still less it is justified in allowing Congress to disregard those commands as the Court understands them. Although Congress' expression of the view that it does have power to alter state suffrage qualifications is entitled to the most respectful consideration by the judiciary, coming as it does from a coordinate branch of government,[85] this cannot displace the duty of this Court to make an independent determination whether Congress has exceeded its powers. The reason for this goes beyond Marshall's assertion that "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 177 (1803).[86] It inheres in the structure

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decision by transferring to the party's Executive Committee the power to set qualifications for participation in the primary. In neither of the *Nixon* cases was the history of the Fourteenth Amendment suggested to the Court. Both cases were argued on the assumption that racial prohibitions on voting in state general elections would violate the Fourteenth as well as the Fifteenth Amendment. This potential line of decision proved abortive when *United States* v. *Classic*, 313 U. S. 299 (1941), laid the groundwork for holding that participation in party primaries was included within the "right . . . to vote" protected by the Fifteenth Amendment. See *Reynolds* v. *Sims*, 377 U. S. 533, 614 n. 72 (1964) (dissenting opinion). The *Nixon* opinions were not relied on by the Court in the subsequent white-primary cases, *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Terry* v. *Adams*, 345 U. S. 461 (1953), and they were not even referred to in the recent cases on voter qualifications cited above.

[85] In this particular instance the other two branches of the Government have in fact expressed conflicting views as to the validity of Title III of the Act, the voting age provision. See H. R. Doc. No. 91–326, 91st Cong., 2d Sess. (1970).

[86] In fact, however, I do not understand how the doctrine of deference to rational constitutional interpretation by Congress, espoused by the majority in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), is consistent with this statement of Chief Justice Marshall or

of the constitutional system itself. Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution-making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure. Nor is that structure adequately protected by a requirement that the judiciary be able to perceive a basis for the congressional interpretation, the only restriction laid down in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966).

It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative fact-finding competence of Court, Congress, and state legislatures. *Ante*, p. —. In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control subject only to review by this Court for reasonableness.

In the first place, this argument has little or no force as applied to the issue whether the Fourteenth Amendment covers voter qualifications. Indeed, I do not understand the adherents of *Morgan* to maintain the con-

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with our reaffirmation of it in *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958):

"[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."

trary. But even on the assumption that the Fourteenth Amendment does place a limit on the sorts of voter qualifications which a State may adopt, I still do not see any real force in the reasoning.

When my Brothers refer to "complex factual questions," *ante*, p. —, they call to mind disputes about primary, objective facts dealing with such issues as the number of persons between the ages of 18 and 21, the extent of their education, and so forth. The briefs of the four States in these cases take no issue with respect to any of the facts of this nature presented to Congress and relied on by my Brothers DOUGLAS, *ante*, p. —, and BRENNAN, WHITE, and MARSHALL, *ante*, p. —. Except for one or two matters of dubious relevance, these facts are not subject to rational dispute. The disagreement in these cases revolves around the evaluation of this largely uncontested factual material.[87] On the assumption that maturity and experience are relevant to intelligent and responsible exercise of the elective franchise, are the immaturity and inexperience of the average 18-, 19-, or 20-year-old sufficiently serious to justify denying such a person a direct voice in decisions affecting his or her life? Whether or not this judgment is characterized as "factual," it calls for striking a balance between incommensurate interests. Where the balance is to be struck depends ultimately on the values and the perspective of the decisionmaker. It is a matter as to which men of good will can and do reasonably differ.

I fully agree that judgments of the sort involved here are beyond the institutional competence and constitu-

[87] Contrast *Metropolitan Cas. Ins. Co.* v. *Brownell*, 294 U. S. 580 (1935), relied on by my colleagues. In that case the crucial factual issue, on which the record was silent, was whether casualty insurance companies not incorporated in Indiana "generally keep their funds and maintain their business offices, and their agencies for the settlement of claims, outside the state." 294 U. S., at 585.

tional authority of the judiciary. See, *e. g., Baker* v. *Carr*, 369 U. S. 186, 266–330 (1962) (Frankfurter, J., dissenting); *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 634–641 (1969) (STEWART, J., dissenting). They are preeminently matters for legislative discretion, with judicial review, if it exists at all, narrowly limited. But the same reasons which in my view would require the judiciary to sustain a reasonable state resolution of the issue also require Congress to abstain from entering the picture.

Judicial deference is based, not on relative fact-finding competence, but on due regard for the decision of the body constitutionally appointed to decide. Establishment of voting qualifications is a matter for state legislatures. Assuming any authority at all, only when the Court can say with some confidence that the legislature has demonstrably erred in adjusting the competing interests is it justified in striking down the legislative judgment. This order of things is more efficient and more congenial to our system and, in my judgment, much more likely to achieve satisfactory results than one in which the Court has a free hand to replace state legislative judgments with its own. See *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963).

The same considerations apply, and with almost equal force, to Congress' displacement of state decisions with its own ideas of wise policy. The sole distinction between Congress and the Court in this regard is that Congress, being an elective body, presumptively has popular authority for the value judgment it makes. But since the state legislature has a like authority, this distinction between Congress and the judiciary falls short of justifying a congressional veto on the state judgment. The perspectives and values of national legislators on the issue of voting qualifications are likely to differ from those of state legislators, but I see no reason

a priori to prefer those of the national figures, whose collective decision, applying nationwide, is necessarily less able to take account of peculiar local conditions. Whether one agrees with this judgment or not, it is the one expressed by the Framers in leaving voter qualifications to the States. The Supremacy Clause does not, as my colleagues seem to argue, represent a judgment that federal decisions are superior to those of the States whenever the two may differ.

To be sure, my colleagues do not expressly say that Congress or this Court is empowered by the Constitution to substitute its own judgment for those of the States. However, before sustaining a state judgment they require a "clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest."[88] *Ante*, p. —; see p. —, n. 31. I should think that if the state interest were truly "compelling" and "substantial," and a clear showing could be made that the voter qualification was "necessary" to its preservation, no reasonable person would think the qualification undesirable. Equivalently, if my colleagues or a majority of Congress deem a given voting qualification undesirable as a matter of policy, they must consider that the state interests involved are not "compelling" or "substantial" or that they can be adequately protected in other ways. It follows that my colleagues must be prepared to hold invalid as a matter

[88] It might well be asked why this standard is not equally applicable to the congressional expansion of the franchise before us. Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard, and it has been held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964) (footnote omitted). Interference with state control over qualifications for voting in presidential elections in order to encourage interstate migration appears particularly vulnerable to analysis in terms of compelling federal interests.

of federal constitutional law all state voting qualifications which they deem unwise, as well as all such qualifications which Congress reasonably deems unwise. For this reason, I find their argument subject to the same objection as if it explicitly acknowledged such a conclusion.

It seems to me that the notion of deference to congressional interpretation of the Constitution, which the Court promulgated in *Morgan*, is directly related to this higher standard of constitutionality which the Court intimated in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), and brought to fruition in *Kramer*. When the scope of federal review of state determinations became so broad as to be judicially unmanageable, it was natural for the Court to seek assistance from the national legislature. If the federal role were restricted to its traditional and appropriate scope, review for the sort of "plain error" which is variously described as "arbitrary and capricious," "irrational," or "invidious," there would be no call for the Court to defer to a congressional judgment on this score that it did not find convincing. Whether a state judgment has so exceeded the bounds of reason as to authorize federal intervention is not a matter as to which the political process is intrinsically likely to produce a sounder or more acceptable result. It is a matter of the delicate adjustment of the federal system. In this area, to rely on Congress would make that body a judge in its own cause. The role of final arbiter belongs to this Court.

III

Since I cannot agree that the Fourteenth Amendment empowered Congress, or the federal judiciary, to control voter qualifications, I turn to other asserted sources of congressional power. My Brother BLACK would find that such power exists with respect to *federal* elections by

virtue of Article I, § 4, and seemingly other considerations which he finds implicit in federal authority.

The constitutional provisions controlling the regulation of congressional elections are the following:

> Art. I, § 2: "the Electors [for Representatives] in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."
>
> Art. I, § 4: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."
>
> Amend. XVII. "The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that "The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 M. Farrand, Records of the Federal Convention of 1787, at 249–250 (1911). He explained further in The Federalist No. 52, at 326 (C. Rossiter ed. 1961).

> "To have reduced the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the

> States as it would have been difficult to the Convention. The provision made by the Convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established or which may be established by the State itself. It will be safe to the United States, because, being fixed by the State constitutions, it is not alterable by the State governments; and it cannot be feared that the people of the States will alter this part of their constitutions in such manner as to abridge the rights secured to them by the Federal Constitution."

See also Federalist No. 60, at 371 (C. Rossiter ed. 1961) (Hamilton), quoted in the opinion of MR. JUSTICE STEWART, *ante*, p. —, which is to the same effect.

As to presidential elections, the Constitution provides:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." Art. II, § 1, cl. 2.
>
> "The Congress may determine the Time of chusing Electors, and the Day on which they shall give their Vote; which Day shall be the same throughout the United States." Art. II, § 1, cl. 4.

Even the power to control the "Manner" of holding elections, given with respect to congressional elections by Article I, § 4, is absent with respect to the selection of presidential electors.[89] And, of course, the fact that it was deemed necessary to provide separately for con-

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[89] Although MR. JUSTICE BLACK rests his decision in part on the assumption that the selection of presidential electors is a "federal" election, the Court held in *In re Green*, 134 U. S. 377, 379 (1890), and repeated in *Ray* v. *Blair*, 343 U. S. 214, 224–225 (1952), that presidential electors act by authority of the States and are not federal officials.

gressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over "Times, Places and Manner" given by Article I, § 4, does not refer to presidential elections, but only to the elections for Congressmen. Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections.

IV

With these major contentions resolved, it is convenient to consider the three sections of the Act individually to determine whether they can be supported by any other basis of congressional power.

A. Voting Age

The only constitutional basis advanced in support of the lowering of the voting age is the power to enforce the Equal Protection Clause, a power found in § 5 of the Fourteenth Amendment. For the reasons already given, it cannot be said that the statutory provision is valid as declaratory of the meaning of that clause. Its validity therefore must rest on congressional power to lower the voting age as a means of preventing invidious discrimination that is within the purview of that clause.

The history of the Fourteenth Amendment may well foreclose the possibility that § 5 empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section, but it is unnecessary for me to explore that question. For I think it fair to say that the suggestion that members of the age group between 18 and 21 are threatened with unconstitutional discrimination, or that any hypothetical discrimination is likely to be affected by lowering the voting age, is little short of fanciful. I see no justification for stretching to find any such possibility

when all the evidence indicates that Congress—led on by recent decisions of this Court—thought simply that 18-year-olds were fairly entitled to the vote and that Congress could give it to them by legislation.[90]

I therefore conclude, for these and other reasons given in this opinion, that in § 302 of the Voting Rights Act Amendments of 1970 Congress exceeded its delegated powers.

B. Residency

For reasons already stated, neither the power to regulate voting qualifications in presidential elections, asserted by my Brother BLACK, nor the power to declare the meaning of § 1 of the Fourteenth Amendment, relied on by my Brother DOUGLAS, can support § 202 of the Act. It would also be frivolous to contend that requiring States to allow new arrivals to vote in presidential elections is an appropriate means of preventing local discrimination against them in other respects, or of forestalling violations of the Fifteenth Amendment. The remaining grounds relied on are the Privileges and Immunities Clause of Article IV, § 2,[91] and the right to travel across state lines.

While the right of qualified electors to cast their ballots and to have their votes counted was held to be a privilege of citizenship in *Ex parte Yarbrough*, 110 U. S. 651 (1884), and *United States* v. *Classic*, 313 U. S. 299 (1941), these decisions were careful to observe that it

[90] At the time these suits were filed only two of the 50 States, Georgia and Kentucky, allowed 18-year-olds to vote, and only two other States, Hawaii and Alaska, set the voting age below 21. In subsequent referenda, voters in 10 States declined to lower the voting age; five States lowered the voting age to 19 or 20; and Alaska lowered the age from 19 to 18. See The Washington Post, Nov. 5, 1970, at A13, col. 5.

[91] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

remained with the States to determine the class of qualified voters. It was federal law, acting on this State-defined class, which turned the right to vote into a privilege of national citizenship. As the Court has consistently held, the Privileges and Immunities Clauses do not react on the mere status of citizenship to enfranchise any citizen whom an otherwise valid state law does not allow to vote. *Minor* v. *Happersett*, 88 U. S. (21 Wall.) 162, 170–175 (1874); *Pope* v. *Williams*, 193 U. S. 621, 632 (1904); *Breedlove* v. *Suttles*, 302 U. S. 277, 283 (1937); cf. *Snowden* v. *Hughes*, 321 U. S. 1, 6–7 (1944). Minors, felons, insane persons, and persons who have not satisfied residency requirements are among those citizens who are not allowed to vote in most States.[92] The Privileges and Immunities Clause of Article IV of the Constitution is a direct descendent of Article IV of the Articles of Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States . . . ."

It is inconceivable that these words when used in the Articles could have been understood to abolish state durational residency requirements.[93] There is not a vestige of evidence that any further extent was envisioned

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[92] At the time the Constitution was adopted, additional restrictions based on payment of taxes and ownership of property, as well as creed and sex, were imposed, making the proposition even clearer.

[93] See Article II: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

for them when they were carried over into the Constitution. And, as I have shown, when they were substantially repeated in § 1 of the Fourteenth Amendment it was affirmatively understood that they did not include the right to vote. The Privileges and Immunities Clause is therefore unavailing to sustain any portion of § 202.

The right to travel across state lines, see *United States* v. *Guest*, 383 U. S. 745, 757–758 (1966), and *Shapiro* v. *Thompson*, 394 U. S. 618, 630 (1969), is likewise insufficient to require Idaho to conform her laws to the requirements of § 202. MR. JUSTICE STEWART justifies § 202 solely on the power under § 5 of the Fourteenth Amendment to enforce the Privileges and Immunities Clause of § 1 which he deems the basis for the right to travel. *Ante*, p. —. I find it impossible to square the position that § 5 authorizes Congress to abolish state voting qualifications based on residency with the position that it does not authorize Congress to abolish such qualifications based on race. Since the historical record compels me to accept the latter position, I must reject the former.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL do not anchor the right of interstate travel to any specific constitutional provision. *Ante*, p. —. Past decisions to which they refer have relied on the two Privileges and Immunities Clauses, just discussed, the Due Process Clause of the Fifth Amendment, and the Commerce Clause. See *Shapiro* v. *Thompson*, 394 U. S., at 630 n. 8; *id.*, at 663–671 (dissenting opinion). The Fifth Amendment is wholly inapplicable to state laws; and surely the Commerce Clause cannot be seriously relied on to sustain the Act here challenged. With no specific clause of the Constitution empowering Congress to enact § 202, I fail to see how that nebulous judicial construct, the right to travel, can do so.

C. Literacy

The remaining provision of the Voting Rights Act Amendments involved in these cases is the five-year suspension of Arizona's requirement that registrants be able to read the Constitution in English and to write their names. Although the issue is not free from difficulty, I am of the opinion that this provision can be sustained as a valid means of enforcing the *Fifteenth* Amendment.

Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.[94] This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make.[95] The fact that the suspension is only for five years will require Congress to re-evaluate at the close of that period. While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.[96] I therefore agree that § 201 of the

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[94] The legislative history of the Voting Rights Act Amendments contains sufficient evidence to this effect, if any be needed.

[95] Cf. the Voting Rights Act of 1965, 79 Stat. 438, which suspended literacy tests only in areas falling within a coverage formula and allowed reinstatement of the tests upon judicial determination that during the preceding five years no tests had been used with discriminatory purpose or effect. 42 U. S. C. (Supp. V) 1973b (a) (1970), amended by Pub. L. No. 91-285 § 3, 84 Stat. 314.

[96] I assume that reasonableness is the applicable standard, notwithstanding the fact that the instant legislation is challenged on

Act is a valid exercise of congressional power to the extent it is involved in this case. I express no view about its validity as applied to suspend tests such as educational qualifications, which do not lend themselves so readily to discriminatory application or effect.

For the reasons expressed in this opinion, I would grant the relief requested in Nos. 43 and 44. I would dismiss the complaint in No. 47 for failure to state a claim on which relief can be granted. In No. 46 I would grant declaratory relief with respect to the validity of § 201 of the Voting Rights Act Amendments as applied to Arizona's current literacy test; I would deny relief in all other respects, with leave to reapply to the United States District Court for the District of Arizona for injunctive relief in the event it proves necessary, which I am confident it will not.

V

In conclusion I add the following. The consideration that has troubled me most in deciding that the 18-year-old and residency provisions of this legislation should be held unconstitutional is whether I ought to regard the doctrine of *stare decisis* as preventing me from arriving at that result. For as I indicated at the outset of this opinion, were I to continue to consider myself constricted by recent past decisions holding that the Equal Protection Clause of the Fourteenth Amendment reaches state electoral processes, I would, particularly perforce of the decisions cited in n. 84, *supra*, be led to cast my vote with those of my Brethren who are of the opinion that the lowering of the voting age and the abolition of state residency requirements in presidential elections are within the ordinary legislative power of Congress.

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the ground that it improperly dilutes the votes of literate Arizona citizens. But see *Kramer* v. *Union Free School Dist. No. 15*, 395 U. S. 621 (1969); n. 88 *supra*.

After much reflection I have reached the conclusion that I ought not to allow *stare decisis* to stand in the way of casting my vote in accordance with what I am deeply convinced the Constitution demands. In the annals of this Court few developments in the march of events have so imperatively called upon us to take a fresh hard look at past decisions, which could well be mustered in support of such developments, than do the legislative lowering of the voting age and, albeit to a lesser extent, the elimination of state residential requirements in presidential elections. Concluding, as I have, that such decisions cannot withstand constitutional scrutiny, I think it my duty to depart from them, rather than to lend my support to perpetuating their constitutional error in the name of *stare decisis*.

In taking this position, I feel fortified by the evident *malaise* among the members of the Court with those decisions. Despite them, a majority of the Court holds that this congressional attempt to lower the voting age by simple legislation is unconstitutional, insofar as it relates to state elections. Despite them, four members of the Court take the same view of this legislation with respect to federal elections as well; and the fifth member of the Court who considers the legislation constitutionally infirm as regards state elections relies not at all on any of those decisions in reaching the opposite conclusion in federal elections. And of the eight members of the Court who vote to uphold the residential provision of the statute, only four appear to rely upon any of those decisions in reaching that result.

In these circumstances I am satisfied that I am free to decide these cases unshackled from a line of decisions which I have felt from the start entailed a basic departure from sound constitutional principle.

APPENDIX TO OPINION OF HARLAN, J.

VOTING RIGHTS ACTS AMENDMENTS OF 1970, PUB. L. 91-285, 84 STAT. 314

TITLE II—SUPPLEMENTAL PROVISIONS

APPLICATION OF PROHIBITION TO OTHER STATES

SEC. 201. (a) Prior to August 6, 1975, no citizen shall be denied, because of his failure to comply with any test or device, the right to vote in any Federal, State, or local election conducted in any State or political subdivision of a State as to which the provisions of section 4 (a) of this Act are not in effect by reason of determinations made under section 4 (b) of this Act.

(b) As used in this section, the term "test or device" means any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

RESIDENCE REQUIREMENTS FOR VOTING

SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or political subdivision at the time of such election, if such citizen shall have complied with

the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by absentee ballot in the State or political subdivision in which he resided immediately prior to his

removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of a registration that does not include a provision for absentee registration.

(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

SEPARABILITY

SEC. 205. If any provision of this Act or the application of any provision thereof to any person or circumstance is judicially determined to be invalid, the remainder of this Act or the application of such provision to other persons or circumstances shall not be affected by such determination.

TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

DECLARATION AND FINDINGS

SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

SEC. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

EFFECTIVE DATE

SEC. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

ARIZONA CONSTITUTION

Art. 7, § 2. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of twenty-one years or over, and shall have resided in the State one year immediately preceding such election, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word 'citizen' shall include persons of the male and female sex.

ARIZONA REVISED STATUTES ANNOTATED

§ 16–101. Qualifications of elector

A. Every resident of the state is qualified to become an elector and may register to vote at all elections authorized by law if he:

1. Is a citizen of the United States.

2. Will be twenty-one years or more of age prior to the regular general election next following his registration.

3. Will have been a resident of the state one year and of the county and precinct in which he claims the right to vote thirty days next preceding the election.

4. Is able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting from memory, unless prevented from so doing by physical disability.

5. Is able to write his name, unless prevented from so doing by physical disability.

B. At an electon held between the date of registration and the next regular general election, the elector is eligible to vote if at the date of the intervening election he is twenty-one years of age and has been a resident of the state one year and the county and precinct thirty days.

C. A person convicted of treason or a felony, unless restored to civil rights, or an idiot, insane person or person under guardianship is not qualified to register.

§ 16–107. Closing of registrations

A. No elector shall be registered to vote in a primary election between five o'clock p. m. of the day which is four months preceding the date of the next general election and six o'clock p. m. of the day of the primary election.

B. No elector shall be registered between five o'clock p. m. of the seventh Monday preceding a general election and six o'clock p. m. of the day thereof. As amended Laws 1958, Ch. 48, § 1.

IDAHO CONSTITUTION

Art. 6, § 2. Qualifications of electors.—Except as in this article otherwise provided, every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector; provided however, that every citizen of the United States, twenty-one years old, who has actually resided in this state for sixty days next preceding the day of election, if registered as required by law, is a qualified elector for the sole purpose of voting for presidential electors; and until otherwise provided by the legislature, women who have the qualifications prescribed in this article may continue to hold such school offices and vote at such school elections as provided by the laws of Idaho territory.

IDAHO CODE

Sec. 34-401. Qualifications of voters.—Every person over the age of twenty-one (21) years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six (6) months immediately preceding the election at which he offers to vote, and in the county thirty (30) days: provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six (6) months, and in the precinct ninety (90) days, where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex.

34–408. Eligibility of new residents to vote.—Each citizen of the United States, who, immediately prior to his removal to this state, was a citizen of another state and who has been a resident of this state for sixty (60) days next preceding the day of election but for less than the six (6) month period of required residence for voting prior to a presidential election, is entitled to vote for presidential and vice-presidential electors at that election, but for no other offices, if

(1) he otherwise possesses the substantive qualifications to vote in this state (except the requirements of residence and registration, and

(2) he complies with the provisions of this act.

34–409. Application for presidential ballot by new residents.—A person desiring to qualify under this act in order to vote for presidential and vice-presidential electors shall be considered as registered within the meaning of this act if on or before ten (10) days prior to the date of the general election, he shall make an application in the form of an affidavit executed in duplicate in the presence of the county auditor, substantially as follows * * *.

34–413. Voting by new residents.—(1) The applicant, upon receiving the ballot for presidential and vice-presidential electors shall mark forthwith the ballot in the presence of the county auditor, but in a manner that the official cannot know how the ballot is marked. He shall then fold the ballot in the county auditor's presence so as to conceal the markings, and deposit and seal it in an envelope furnished by the county auditor.

34–1101. Absent voting authorized.—Any qualified elector of the state of Idaho who is absent or expects to be absent from the election precinct in which he resides on the day of holding any election under any of the laws of this state in which an official ballot is required, or who is within the election precinct and is, or will be,

unable, because of physical disability, or because of blindness, to go to the voting place, and if registration is required for such election, who is duly registered therefor, may vote at any such election, as hereinafter provided.

34–1105. Return of ballot.—On marking such ballot or ballots such absent or disabled or blind elector shall refold same as theretofore folded and shall inclose the same in said official envelope and seal said envelope securely and mail by registered or certified mail or deliver it in person to the officer who issued same; provided, that an absentee ballot must be received by the issuing officer by 12:00 o'clock noon on the day of the election before such ballot may be counted. Said ballot or ballots shall be so marked, folded and sealed by said voter in private and secretly. Provided, that whenever the disability or blindness makes it necessary that the voter shall be assisted in marking his ballot, such voter may have the assistance of any person of his choice in marking his ballot.

OREGON CONSTITUTION

Art. II, § 2. Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 21 years of age or older * * *.

TEXAS CONSTITUTION

Art. VI, § 1. Classes of persons not allowed to vote

Section 1. The following classes of persons shall not be allowed to vote in this State, to wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

§ 2. Qualified elector; registration; absentee voting.

Sec. 2 Every person subject to none of the foregoing

disqualifications who shall have attained the age of twenty-one (21) years and who shall be a citizen of the United States and who shall have resided in this State one (1) year next preceding an election and the last six (6) months within the district or county in which such person offers to vote, shall be deemed a qualified elector; provided, however, that before offering to vote at an election a voter shall have registered annually, but such requirement for registration shall not be considered a qualification of an elector within the meaning of the term "qualified elector" as used in any other Article of this Constitution in respect to any matter except qualification and eligibility to vote at an election. Any legislation enacted in anticipation of the adoption of this Amendment shall not be invalid because of its anticipatory nature. The Legislature may authorize absentee voting. And this provision of the Constitution shall be self-enacting without the necessity of further legislation.

TEXAS ELECTION CODE

Article 5.01. Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.
2. Idiots and lunatics.
3. All paupers supported by the county.
4. All persons convicted of any felony except those restored to full citizenshp and right of suffrage or pardoned.

Art. 5.02. Qualification and requirements for voting.

Every person subject to none of the foregoing disqualifications who shall have attained the age of twenty-one years and who shall be a citizen of the United States and who shall have resided in this state one year next preceding an election and the last six months within the district or county in which such persons offers to vote, and who shall have registered as a voter, shall be deemed

a qualified elector. No person shall be permitted to vote unless he has registered in accordance with the provisions of this code. The provisions of this section, as modified by Sections 35 and 39 of this code, shall apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—October Term, 1970

State of Oregon, Plaintiff, 43 v. John N. Mitchell, Attorney General of the United States.	On Bills of Complaint.
State of Texas, Plaintiff, 44 v. John N. Mitchell, Attorney General of the United States.	
United States, Plaintiff, 46 v. State of Arizona.	
United States, Plaintiff, 47 v. State of Idaho.	

[December 21, 1970]

Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall dissent from the judgment insofar as it declares § 302 unconstitutional as applied to state and local elections, and concur in the judgment in all other respects, for the following reasons.

These cases draw into question the power and judgment of Congress in enacting Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 314. The State of Arizona challenges the power of Congress to impose a nationwide ban, until August 6, 1975, on the use of literacy and certain other tests to limit the franchise in any election. The State of Idaho takes issue

with the assserted congressional power to find that the imposition of a durational residence requirement to deny the right to vote in elections for President and Vice President imposes a burden upon the right of free interstate migration that is not necessary to further a compelling state interest.[1] Finally, the States of Oregon, Texas, Arizona, and Idaho would have us strike down as unreasonable and beyond congressional power the findings, embodied in § 301 (a) of the Amendments, that denying the vote to otherwise qualified persons 18 to 21 years of age, while granting it to those 21 years of age and older, violates the Equal Protection Clause and is, in any event, not reasonably related to any compelling state interest.[2] In Nos. 43 and 44, Oregon and Texas have

[1] Section 202 (a) of the Amendments embodies a congressional finding that

"the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

. . . . . .

"(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

. . . . . .

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."

[2] Section 301 (a) of the Amendments provides:

"The Congress finds and declares that the imposition and application of the requirements that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest."

invoked our original jurisdiction under Article III, § 2, of the Constitution to restrain the Attorney General of the United States, a citizen of New York, from enforcing the 18-year-old voting provisions of the Amendments. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 307 (1966). In Nos. 46 and 47, the United States seeks orders enjoining Arizona from enforcing age and literacy limitations on the franchise,[3] and enjoining Idaho from enforcing age, residence, and absentee voting limitations,[4] insofar as those limitations are inconsistent with the 1970 Amendments. Original jurisdiction, again, is founded upon Article III, § 2 of the Constitution. See *United States* v. *California*, 332 U. S. 19, 22 (1947). Since, in our view, congressional power to enact the challenged Amendments is found in the enforcement clauses of the Fourteenth and Fifteenth Amendments, and since we may easily perceive a rational basis for the congressional judgments underlying each of them, we would deny relief in Nos. 43 and 44, and issue the requested orders in Nos. 46 and 47.

I

The Voting Rights Act of 1965, 79 Stat. 438, 42 U. S. C. § 1973 *et seq.* (1964 ed., Supp. V), proscribed the use of any "test or device," [5] including literacy tests, in States

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[3] Arizona Constitution Art. 7, § 2, limits the franchise to those 21 years of age and older. Ariz. Rev. Stat. Ann. § 16–101 (Supp. 1970) requires voters to be able to read the Federal Constitution (in English), and to write their names.

[4] Idaho Constitution, Art. 6, § 2, requires all voters to be 21 years of age or older, and requires 60 days' residence within the State as a precondition to voting in presidential elections. Idaho Code Ann. § 34–408 (1963), further requires that 60-day residents have been citizens of another State prior to their removal to Idaho. Provisions for absentee balloting are contained in *id.*, §§ 34–1101 to 34–1125.

[5] Section 4 (c) of the 1965 Act, 42 U. S. C. § 1973b (c) (1964 ed., Supp. V), defines a "test or device" as "any requirement that a

or their political subdivisions which fell within a coverage formula set forth in § 4 (b) of the 1965 Act. 42 U. S. C. §§ 1973b (a), (b) (1964 ed., Supp. V). Although we had previously concluded that literacy tests, fairly administered, violate neither the Fourteenth nor the Fifteenth Amendments, *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959), we nevertheless upheld their selective proscription by Congress. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). Canvassing the "voluminous" legislative history of the 1965 Act, we found ample basis for a legislative conclusion that such a proscription was necessary to combat the "insidious and pervasive evil" of racial discrimination with regard to voting. *Id.*, at 308–315. Accordingly, we held the proscription to be well within the power of Congress granted by § 2 of the Fifteenth Amendment. *Id.*, at 327–334. Three years later, in *Gaston County* v. *United States*, 395 U. S. 285 (1969), we sustained application of the ban on literacy tests to a county where there was no evidence that the test itself was discriminatory or that—at least since 1962 [6]—it had been administered in a discriminatory manner. Notwithstanding this fact, we noted that the record did contain substantial evidence that in years past, "Gaston County [had] systematically deprived its black citizens of the educational opportunities it granted to its white citizens."

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person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

[6] *Gaston County* was a suit by the county under § 4 (a) of the 1965 Act, 42 U. S. C. § 1973b (a) (1964 ed., Supp. V), to reinstate the county's literacy test. The county would have been entitled to do so upon demonstration that, for the preceding five years, no "test or device" had been there used for the purpose or with the effect of abridging the right to vote on account of race or color.

Id., at 297. Since this "in turn deprived them of an equal opportunity to pass the literacy test," *id.*, at 291, even impartial administration of an impartial test would inevitably result in just the discrimination that Congress and the Fifteenth Amendment had sought to proscribe. *Id.*, at 296–297; see *South Carolina* v. *Katzenbach*, 383 U. S., at 308, 333–334.

No challenge is made in the present case either to the 1965 Act or to the five-year extension of its ban on "tests or devices" embodied in Title I of the 1970 Amendments. Arizona does, however, challenge § 201 of the Amendments, which extends (until August 6, 1975) the 1965 Act's selective ban on the use of "tests or devices" to all States and political subdivisions in which it is not already in force by virtue of the 1965 Act. In substance, Arizona argues that it is and has been providing education of equal quality for all its citizens; that its literacy test is both fair and fairly administered; and that there is no evidence in the legislative record upon which Congress could have relied to reach a contrary conclusion. It urges that to the extent that any citizens of Arizona have been denied the right to vote because of illiteracy resulting from discriminatory governmental practices, the unlawful discrimination has been by governments other than the State of Arizona or its political subdivisions. Arizona, it suggests, should not have its laws overridden to cure discrimination on the part of governmental bodies elsewhere in the country.

We need not question Arizona's assertions as to the nondiscriminatory character, past and present, of its educational system. Congressional power to remedy the evils resulting from state-sponsored racial discrimination does not end when the subject of that discrimination removes himself from the jurisdiction in which the injury occurred. "The Constitution was framed under the dominion of a political philosophy less parochial in range.

It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935); see *Edwards* v. *California*, 314 U. S. 160, 173–176 (1941). In upholding the suspension of literacy tests as applied to Gaston County under the 1965 Act, we could see "no legal significance" in the possibility that adult residents of the county might have received their education "in other counties or States also maintaining segregated and unequal school systems." *Gaston County* v. *United States*, 395 U. S., at 293 n. 9.[8]

The legislative history of the 1970 Amendments contains substantial information upon which Congress could have based a finding that the use of literacy tests in Arizona and in other States where their use was not proscribed by the 1965 Act has the effect of denying the vote to racial minorities whose illiteracy is the consequence of a previous, governmentally sponsored denial of equal educational opportunity. The Attorney General of Arizona told the Senate Subcommittee on Constitutional Rights that many older Indians in the State were "never privileged to attend a formal school."[9] Extensive testimony before both Houses indicated that racial minorities have long received inferior educational

[8] We there reserved only the question of the application of the 1965 Act to suspend literacy tests "in the face of racially disparate educational or literacy achievements *for which a government bore no responsibility.*" *Id.*, n. 8 (emphasis supplied).

[9] Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 675 (1970) (hereafter Senate Hearings). Schooling of Indians has for some time been the responsibility of the Federal Government. See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U. S. 685, 690–691 (1965).

opportunities throughout the United States.[10] And interstate migration of such persons, particularly of Negroes from the Southern States, has long been a matter of common knowledge.[11]

Moreover, Congress was given testimony explicitly relating the denial of educational opportunity to inability to pass literacy tests in States not covered by the formula contained in the 1965 Act. The United States Commission on Civil Rights reported a survey of the Northern and Western States which concluded that literacy tests have a negative impact upon voter registration "which falls most heavily on blacks and persons of Spanish surname."[12] With regard specifically to Arizona, the Chairman of the Navajo Tribal Council testified that a greater percentage of Navajos are registered in New Mexico, which has no literacy test, than in Arizona.[13]

In short, there is no question but that Congress could legitimately have concluded that the use of literacy tests anywhere within the United States has the inevitable effect of denying the vote to members of racial minorities whose inability to pass such tests is the direct consequence of previous governmental discrimination in education. Almost five years ago, we found in § 2 of the Fifteenth Amendment an ample grant of legislative

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[10] *E. g.*, Senate Hearings at 185–187; Hearings on the Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess. 55–57, 223–225 (1970) (hereafter House Hearings).

[11] For example, 1960 census data indicate that from 1955 to 1960, 4,388 blacks moved from Southern States to Arizona, 74,804 to California, and 74,821 to New York. 1 Bureau of the Census, 1960 Census of the Population, pts. 4, 6, 23, 34, and Table 100.

[12] Senate Hearings, *supra* n. 9, at 399; see *id.*, at 400–407.

[13] Senate Hearings, *supra* n. 9, at 678. Tribal Chairman Nakai viewed Arizona's literacy test as the primary cause of this disparity.

power for Congress to decree a selective proscription of such tests in certain portions of the country. *South Carolina* v. *Katzenbach*, 383 U. S., at 327–334. We have since held that power ample to cover the proscription of fair literacy tests, fairly administered, which nevertheless operate to disenfranchise racial minorities because of previous governmental discrimination against them in education. *Gaston County* v. *United States*, 395 U. S., at 287, 289–293. Five years of experience with the 1965 Act persuaded Congress that a nationwide ban on literacy and other potentially discriminatory tests was necessary to prevent racial discrimination in voting throughout the country. That conclusion is amply supported in the legislative record and § 201 of the 1970 Amendments is accordingly well within the scope of congressional power.

II

Section 202 of the 1970 Amendments abolishes all durational state residence requirements restricting the right to vote in presidential elections. In their place, Congress has undertaken to prescribe a uniform nationwide system of registration and absentee voting designed to allow all otherwise qualified persons to vote in such elections regardless of the length of time they have lived in a particular jurisdiction.[14] The States are required to keep open their registration rolls for presidential elections until 30 days preceding the election. § 202 (d). Persons who have changed their residence within 30 days of the election are, if otherwise qualified, entitled to vote either in person or by absentee ballot in the State of their previous residence, § 202 (e), and the States are compelled to permit the casting of absentee

[14] The States are permitted, should they desire, to adopt practices less restrictive than those prescribed by the 1970 Amendments. § 202 (g).

ballots by all properly qualified persons who have made application not less than seven days prior to the election, and returned the ballot to the appropriate officials not later than the closing of polls on election day. §§ 202 (b), (d). Provision must also be made by the States to allow absentee registration. § 202 (f).

Idaho challenges the power of Congress to enact such legislation insofar as it conflicts with Idaho's statutory and constitutional provisions regarding durational residence requirements for voting; regarding absentee voting; and regarding absentee registration.[15] The State's argument in brief is that the Constitution has left to the States the power to set qualifications for voters in both state and federal elections, subject only to certain explicit limitations such as, for example, those imposed by the Fourteenth, Fifteenth, Nineteenth, and Twenty-fourth Amendments. Admitting that unreasonable residence requirements may not withstand judicial scrutiny, *Carrington* v. *Rash*, 380 U. S. 89 (1965), Idaho urges that its 60-day residence requirement is necessary for protection against fraud, and for administrative purposes. In consequence, § 202 of the 1970 Amendments is said to be of no weight against these compelling state interests.

Whether or not the Constitution vests Congress with particular power to set qualifications for voting in strictly federal elections,[16] we believe there is an adequate constitutional basis for § 202 in § 5 of the Fourteenth Amendment. For more than a century, this Court has recognized the constitutional right of all citizens to unhindered interstate travel and settlement. *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J.); *Crandall* v. *Nevada*, 6 Wall. 35, 43–44 (1868); *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869); *Edwards* v. *California*, 314 U. S.

[15] See n. 4, *supra*.

[16] See the opinion of Mr. Justice Douglas, *ante*, at —.

160 (1941); *United States* v. *Guest*, 383 U. S. 745, 757–758 (1966); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631, 634 (1969). From whatever constitutional provision this right may be said to flow,[17] both its existence and its fundamental importance to our Federal Union have long been established beyond question.

By definition, the imposition of a durational residence requirement operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration. Of course, governmental action that has the incidental effect of burdening the exercise of a constitutional right is not *ipso facto* unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Shapiro* v. *Thompson*, 394 U. S., at 634; *United States* v. *Jackson*, 390 U. S. 570, 582–583 (1968); *Sherbert* v. *Verner*, 374 U. S. 398, 406–409 (1963). And once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958).

In the present case, Congress has explicitly found both that the imposition of durational residence requirements abridges the right of free interstate migration and that such requirements are not reasonably related to any compelling state interests. 1970 Amendments, §§ 202 (a)(2), (6). The latter finding was made with full cognizance of the possibility of fraud and administrative difficulty. Senator Goldwater, testifying at Senate hearings on the bill, pointed out that 40 States presently allow

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[17] See *Shapiro* v. *Thompson*, 394 U. S., at 630 and n. 8; *United States* v. *Guest*, 383 U. S., at 757–758.

registration until 30 days or less prior to the election.[18] Idaho itself allows registration by those desiring to vote as new residents in presidential elections within 10 days of balloting. Idaho Code Ann. § 34–409 (1963). And Idaho's assertion of the administrative unfeasibility of maintaining separate registration lists for fully qualified voters and for those qualified only for presidential balloting is difficult to credit in light of the fact that the Idaho Constitution, Art. 6, § 2, itself sets separate qualifiations for voting in general and in presidential elections. The provisions for absentee voting, as Senator Goldwater pointed out on the floor of the Senate, were likewise "drawn from the proven practice of the States themselves." [19] Thirty-seven States allow application within a week of the election, and 40 permit the marked ballot to be returned on election day.[20] Finally, Idaho has provided no evidence beyond the mere assertion that the scheme of § 202 is inadequate to protect against fraud. But the only kind of fraud asserted is the possibility of dual voting, and Idaho has provided no explanation why the 30-day period between the closing of new registrations and the date of election would not provide, in light of modern communications, adequate time to insure against such frauds. Accordingly, we find ample justification for the congressional conclusion that § 202 is a reasonable means for

[18] Senate Hearings, *supra* n. 9, at 282.

[19] 116 Cong. Rec. 3539 (daily ed., Mar. 11, 1970).

[20] *Id.* Idaho Code Ann. §§ 34–1101, 34–1102, 34–1103 appear to allow application to be made at any time. *Id.*, § 34–1121 allows application up to five days before the election for persons in United States service. The ballot may be returned any time prior to noon on election day, *id.*, § 34–1105 (Supp. 1969). Finally, effective January 1, 1971, applications may be made up to 5:00 p. m. the day before the election. *Id.*, § 34–1002 (Supp. 1970). In such circumstances, the argument of administrative impossibility from the viewpoint of Idaho seems almost chimerical.

eliminating an unnecessary burden on the right of interstate migration. *United States* v. *Guest*, *supra*.

III

The final question presented by these cases is the propriety of Title III of the 1970 Amendments, which forbids the States from disenfranchising persons over the age of 18 because of their age. Congress was of the view that this prohibition, embodied in § 302 of the Amendments, was necessary among other reasons in order to enforce the Equal Protection Clause of the Fourteenth Amendment. See §§ 301 (a)(2), (b). The States involved in the present litigation question the assertion of congressional power to make that judgment.

It is important at the outset to recognize what is not involved in these cases. We are not faced with an assertion of congressional power to regulate any and all aspects of state and federal elections, or even to make general rules for the determination of voter qualifications. Nor are we faced with the assertion that Congress is possessed of plenary power to set minimum ages for voting throughout the States. Every State in the Union has conceded by statute that citizens over the age of 21 are capable of intelligent and responsible exercise of the right to vote. The single, narrow question presented by these cases is whether Congress was empowered to conclude, as it did, that citizens 18 to 21 years of age are not substantially less able.

We believe there is serious question whether a statute granting the franchise to citizens over 21 while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause. Regardless of the answer to this question, however, it is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those de-

terminations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases. We would uphold § 302 as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

A

All parties to these cases are agreed that the States are given power, under the Constitution, to determine the qualifications for voting in state elections. Art. I, § 2; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 (1959); *Carrington* v. *Rash*, 380 U. S. 89, 91 (1965). But it is now settled that exercise of this power, like all other exercises of state power, is subject to the Equal Protection Clause of the Fourteenth Amendment. *Carrington* v. *Rash, supra; Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970). Although it once was thought that equal protection required only that a given legislative classification, once made, be evenly applied, see *Hayes* v. *Missouri*, 120 U. S. 68, 71–72 (1887), for more than 70 years we have consistently held that the classifications embodied in a state statute must also meet the requirements of equal protection. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 155 (1897); see *McLaughlin* v. *Florida*, 379 U. S. 184, 189–191 (1964), and cases cited.

The right to vote has long been recognized as a "fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886); see *Reynolds* v. *Sims*, 377 U. S. 533, 562 (1964); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968). "Any unjustified discrimination in determining who may participate in political affairs undermines the legitimacy of representative government." *Kramer* v. *Union Free School District*, 395 U. S. at 626. Consequently, when exclusions from

the franchise are challenged as violating the Equal Protection Clause, judicial scrutiny is not confined to the question whether the exclusion may reasonably be thought to further a permissible interest of the State. Cf. *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 583–584 (1935). "A more exacting standard obtains." *Kramer* v. *Union Free School District*, 395 U. S., at 633. In such cases, "the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.*, at 627; *Cipriano* v. *City of Houma*, 395 U. S. 701, 704 (1969).

In the present cases, the States justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the States' interests in promoting intelligent and responsible exercise of the franchise.[21] There is no reason to question the legitimacy and importance of these interests. But standards of intelligence and responsibility, however defined, may permissibly be applied only to the means whereby a prospective voter determines how to exercise his choice, and not to the actual choice itself. Were it otherwise, such standards could all too easily serve as mere epithets designed to cloak the exclusion of a class of voters simply because of the way they might vote. Cf. *Evans* v. *Cornman*, 398 U. S., at 422–423. Such a state purpose is, of course, constitutionally impermissible. *Carrington* v. *Rash*, 380 U. S., at 94. We must, therefore, examine with particular care the asserted connection between age limitations and the admittedly laudable state purpose to further intelligent and responsible voting.

[21] Idaho, in addition, claims that its interest in setting qualifications for voters in its own elections serves without more as a compelling state interest sufficient to justify the challenged exclusion. But there is no state interest in the mere exercise of power; the power must be exercised for some reason. The only reason asserted by Idaho for the exercise of its power is that already mentioned—promotion of intelligent and responsible voting.

We do not lack a starting point for this inquiry. Although the question has never been squarely presented, we have in the past indicated that age is a factor not necessarily irrelevant to qualifications for voting. *Lassiter* v. *Northampton County Board of Elections*, 360 U. S., at 51; *Kramer* v. *Union Free School District*, 395 U. S., at 625–626. But recognition that age is not in all circumstances a "capricious or irrelevant factor," *Harper* v. *Virginia State Board of Elections*, 383 U. S., at 668, does not insure the validity of the particular limitation involved here. *Evans* v. *Cornman*, 398 U. S., at 425–426. Every State in the Union has concluded for itself that citizens over the age of 21 are capable of responsible and intelligent voting. Accepting this judgment, there remains the question whether citizens 18 to 21 years of age may fairly be said to be less able.

State practice itself in other areas casts doubt upon any such proposition. Each of the 50 States has provided special mechanisms for dealing with persons who are deemed insufficiently mature and intelligent to understand, and to conform their behavior to, the criminal laws of the State.[22] Forty-nine of the States have concluded that, in this regard, 18-year-olds are invariably to be dealt with according to precisely the same standards prescribed for their elders.[23] This at the very least is evidence of a nearly unanimous legislative judgment on the part of the States themselves that differences in maturity and intelligence between 18-year-olds and persons over the age of 21 are too trivial to warrant specialized treatment for *any* of the former class in the critically important matter of criminal responsibility.[24] Similarly,

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[22] 116 Cong. Rec. 3518 (daily ed., Mar. 11, 1970) (Library of Congress, Legislative Reference Service survey).

[23] *Ibid.*

[24] Nor does the California statute, Cal. Welf. & Inst'ns Code § 602 (West 1966), necessarily evidence a contrary conclusion. California

every State permits 18-year-olds to marry, and 39 States do not require parental consent for such persons of one or both sexes.[25] State statutory practice in other areas follows along these lines, albeit not as consistently.[26]

Uniform state practice in the field of education points the same way. No State in the Union requires attendance at school beyond the age of 18. Of course, many 18-year-olds continue their education to 21 and beyond. But no 18-year-old who does not do so will be disenfranchised thereby once he reaches the age of 21.[27]

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permits its juvenile court to waive jurisdiction of persons over the age of 16 to the regular criminal courts, and state practice appears to be that very few if any felony defendants over the age of 18 are ever tried as juveniles. California Continuing Education of the Bar, California Juvenile Court Practice 35–36 (1968). This may well indicate that the California statute reflects merely a legislative conclusion that the slight burden of waiver hearings is outweighed by the possibility, however slight, that a very few individuals between the ages of 18 and 21 might in fact be more appropriately treated as juveniles.

[25] 116 Cong. Rec. 3518 (daily ed., Mar. 11, 1970).

[26] For example, in California any women 18 years old may marry without parental consent, and any man of that age may marry with the consent of one parent. Cal. Civ. Code § 4101 (West 1970). Any married person who has attained the age of 18 is treated in precisely the same way as all persons over the age of 21 with regard to all provisions of the Civil Code, Probate Code, and Code of Civil Procedure, as well as for the purposes of making contracts or entering into any agreement regarding property or his estate. Cal. Civ. Code § 25 (West Supp. 1970). The State Labor Department treats males over the age of 18 as adults. Cal. Labor Code §§ 1172, 3077 (West 1955). Persons over the age of 18 may serve civil process in the State. Cal. Civ. Proc. Code § 410 (West Supp. 1970).

[27] Some States, of course, do attempt to condition exercise of the franchise upon the ability to pass a literacy test. Presumably some 18-year-old illiterates will be literate at 21. But in light of the fact that 81 percent of the disenfranchised class are high school graduates, it would seem that the number of 18-year-old illiterates who are literate three years later is vanishingly small. See Hearings

Whether or not a State could in any circumstances condition exercise of the franchise upon educational achievements beyond the level reached by 18-year-olds today, there is no question but that no State purports to do so. Accordingly, that 18-year-olds as a class may be less educated than some of their elders [28] cannot justify restriction of the franchise, for the States themselves have determined that this incremental education is irrelevant to voting qualifications. And finally, we have been cited to no material whatsoever that would support the proposition that intelligence, as opposed to educational attainment, increases between the ages of 18 and 21.

One final point remains. No State seeking to uphold its denial of the franchise to 18-year-olds has adduced anything beyond the mere difference in age. We have already indicated that the relevance of this difference is contradicted by nearly uniform state practice in other areas. But perhaps more important is the uniform experience of those States—Georgia since 1943, and Kentucky since 1955—that have permitted 18-year-olds to vote.[29] We have not been directed to a word of testimony or other evidence that would indicate either that 18-year-olds

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on S. J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 133 (1970) (Senator Goldwater). Of course, for reasons that apply as well to 18-year-olds as to others, we have today upheld a nationwide suspension of all literacy tests. *Ante*, at —. But in any event, that some 18-year-olds may be illiterate is hardly sufficient reason for disenfranchising the entire class. See *Kramer* v. *Union Free School District*, 395 U. S., at 632–633.

[28] Eighteen-year-olds as a class are better educated than some of their elders. The median number of school years completed by 18- and 19-year-olds two years ago was 12.2; it was 8.8 for persons 65 to 74. Bureau of the Census, Educational Attainment, table 1 (Current Population Reports, Series P–20, No. 182) (1969).

[29] Hawaii and Alaska have, since their admission to the Union in 1959), allowed the vote to 19-year-olds (Alaska) and 20-year-olds (Hawaii).

in those States have voted any less intelligently and responsibly than their elders, or that there is any reasonable grounds for belief that 18-year-olds in other States are less able than those in Georgia and Kentucky. On the other hand, every person who spoke to the issue in either the House or Senate was agreed that 18-year-olds in both States were at least as interested, able, and responsible in voting as were their elders.[30]

In short, we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted to rest. But there is no reason for us to decide whether, in a proper case, we would be compelled to hold this restriction a violation of the Equal Protection Clause. For as our decisions have long made clear, the question we face today is not one of judicial power under the Equal Protection Clause. The question is the scope of congressional power under § 5 of the Fourteenth Amendment. To that question we now turn.

B

As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact. This is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment. For although equal protection requires that all persons "under like circumstances and conditions" be treated alike, *Hayes* v. *Missouri*, 120 U. S. 68, 71–72 (1887), such a formulation merely raises, but does not answer the question whether a legislative classification has re-

[30] See, *e. g.*, 116 Cong. Rec. 3214–3215 (Senator Cook), 3477 (Senators Talmadge and Ervin) (daily ed., Mar. 9, 11, 1970); Senate Hearings, *supra* n. 9, at 343 (Governor Maddox).

sulted in different treatment of persons who are in fact "under like circumstances and conditions."

Legislatures, as well as courts, are bound by the provisions of the Fourteenth Amendment. *Cooper* v. *Aaron*, 358 U. S. 1, 18–20 (1958). When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations. *Kotch* v. *Board of River Pilot Commissioners*, 330 U. S. 552, 556, 563–564 (1947); see *Kramer* v. *Union Free School District*, 395 U. S. 621, 627–628 (1969). Accordingly, "[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584 (1935).[31]

But, as we have consistently held, this limitation on judicial review of state legislative classifications is a limitation stemming not from the Fourteenth Amendment itself, but from the nature of judicial review. It is

[31] The state of facts necessary to justify a legislative discrimination will of course vary with the nature of the discrimination involved. When we have been faced with statutes involving nothing more than state regulation of business practices, we have often found mere administrative convenience sufficient to justify the discrimination. *E. g., Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487, 488–489 (1955). But when a discrimination has the effect of denying or inhibiting the exercise of fundamental constitutional rights, we have required that it be not merely convenient, but necessary. *Kramer* v. *Union Free School District*, 395 U. S., at 627; *Carrington* v. *Rash*, 380 U. S. 89, 96 (1965); see *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *United States* v. *Jackson*, 390 U. S. 570, 582–583 (1968). And we have required as well that it be necessary to promote not merely a constitutionally permissible state interest, but a state interest of substantial importance. *Kramer* v. *Union Free School District, supra; Carrington* v. *Rash, supra; Shelton* v. *Tucker*, 364 U. S. 479, 487–490 (1960); see *United States* v. *O'Brien, supra.*

simply a "salutary principle of judicial decision," *Metropolitan Co.* v. *Brownell, supra,* one of the "self-imposed restraints intended to protect [the Court] and the state against irresponsible exercises of [the Court's] unappealable power." *Fay* v. *New York,* 332 U. S. 261, 282 (1947). The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature's finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," or "unreasonable." *Communist Party* v. *Control Board,* 367 U. S. 1, 94–95 (1961); *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–154 (1938); *Metropolitan Co.* v. *Brownell,* 294 U. S., at 583–584.

Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. See *Katzenbach* v. *Morgan,* 384 U. S. 641, 654–656 (1966). It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means. *Id.,* at 656–657; *Fay* v. *New York,* 332 U. S., at 282–283; *Ex parte Virginia,* 100 U. S. 339, 347–348 (1880).

The scope of our review in such matters has been established by a long line of consistent decision. "It is not for the courts to re-examine the validity of these legislative findings and reject them." *Communist Party* v. *Control Board*, 367 U. S., at 94. "[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary . . . our investigation is at an end." *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304 (1964); *Katzenbach* v. *Morgan*, 384 U. S., at 653; see *Galvan* v. *Press*, 347 U. S. 522, 529 (1954).[32]

This scheme is consistent with our prior decisions in related areas. The core of dispute over the constitutionality of Title III of the 1970 Amendments is a confiict between state and federal legislative determinations of the factual issues upon which depend decision of a federal constitutional question—the legitimacy, under the Equal Protection Clause, of state discrimination against persons between the ages of 18 and 21. Our cases have repeatedly emphasized that, when state and federal claims come into conflict, the primacy of federal power requires that the federal finding of fact control. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415–417 (1964); *Townsend* v. *Sain*, 372 U. S. 293, 311–312 (1963); *Tarble's Case*, 13 Wall. 397, 406–407 (1872); cf. *United States* v. *Darby*, 312 U. S. 100, 119

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[32] As we emphasized in *Katzenbach* v. *Morgan*, *supra*, "§ 5 does not grant Congress power to . . . enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.'" 384 U. S., at 651 n. 10. As indicated above, a decision of this Court striking down a state statute expresses, among other things, our conclusion that the legislative findings upon which the statute is based are so far wrong as to be unreasonable. Unless Congress were to unearth new evidence in its investigation, its identical findings on the identical issue would be no more reasonable than those of the state legislature.

(1941). The Supremacy Clause requires an identical result when the conflict is one of legislative, not judicial, findings.

Finally, it is no answer to say that Title III intrudes upon a domain reserved to the States—the power to set qualifications for voting. It is no longer open to question that the Fourteenth Amendment applies to this, as to all other, exercises of state power. *Kramer* v. *Union Free School District, supra,* and cases cited. As we said in answer to a similar contention almost a century ago, "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." *Ex parte Virginia,* 100 U. S. 339, 347–348 (1880).

C

Our Brother HARLAN has set out in some detail the historical evidence which persuades him that the framers of the Fourteenth Amendment did not believe that the Equal Protection Clause, either through judicial action or through congressional enforcement under § 5 of the Amendment, could operate to enfranchise Negroes in States which denied them the vote. *Ante,* at ———. From this he has concluded "that the Fourteenth Amendment was never intended to restrict the right of the States to allocate their political power as they see fit and therefore that it does not authorize Congress to set voter qualifications in either state or federal elections." *Ante,* at —. This conclusion, if accepted, would seem to require as a corollary that although States may not, under the Fifteenth Amendment, discriminate against Negro *voters,* they are free so far as the Federal Constitution is concerned to discriminate against Negro or unpopular *candidates* in any way they desire. Not surprisingly, our Brother HARLAN's thesis is explicitly dis-

avowed by all the States party to the present litigation,[33] and has been presented to us only in the briefs *amici curiae* of Virginia and, perhaps, Mississippi.[34] We could not accept this thesis even if it were supported by historical evidence far stronger than anything adduced here today. But in our view, our Brother HARLAN's historical analysis is flawed by his ascription of 20th-century meanings to the words of 19th-century legislators. In consequence, his analysis imposes an artificial simplicity upon a complex era, and presents as universal beliefs that were held by merely one of several groups competing for political power. We can accept neither his judicial conclusion nor his historical premise that the original understanding of the Fourteenth Amendment left it within the power of the States to deny the vote to Negro citizens.

It is clear that the language of the Fourteenth Amendment, which forbids a State to "deny any person within its jurisdiction the equal protection of the laws," applies on its face to all assertions of state power, however made. More than 40 years ago, this Court faced for the first time the question whether a State could deny Negroes the right to vote in primary elections. Writing for a unanimous Court, Mr. Justice Holmes observed tartly that "[w]e find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth." *Nixon* v. *Herndon*, 273 U. S. 536, 540–541 (1927); see *Nixon* v. *Condon*, 286 U. S. 73, 83, 87–89 (1932) (Cardozo, J.); *Anderson* v. *Martin*, 375 U. S. 399 (1964); cf. *Raymond* v. *Chicago Union Traction Co.*, 207

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[33] Brief for the State of Oregon, at 10–13; Brief for the State of Texas, at 10–12; Brief for the State of Arizona, at 19; Brief for the State of Idaho, at 22, 28–30.

[34] Brief *amicus curiae* for the Commonwealth of Virginia, at 13–22; see Brief *amicus curiae* for the State of Mississippi, at 7–11.

U. S. 20, 35–36 (1907). If the broad language of the Equal Protection Clause were to be read as nevertheless allowing the States to deny equal political rights to any citizens they see fit to exclude from the political process, far more is involved than merely shifting the doctrinal basis of such cases as *Nixon* v. *Herndon* from the Fourteenth to the Fifteenth Amendment. For the Fifteenth Amendment applies only to voting, not to the holding of public office; in consequence, our Brother HARLAN's view would appear to leave the States free to encourage citizens to cast their votes solely on the basis of race (a practice found to violate the Fourteenth Amendment in *Anderson* v. *Martin*, *supra*), or even presumably to deny Negro citizens the right to run for office at all.[35] We cannot believe that the Equal Protection Clause would permit such discrimination.

In any event, it seems to us, the historical record will not bear the weight our Brother HARLAN has placed upon it. His examination of the historical background of the Fourteenth Amendment leads him to conclude that it is "clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment," *ante*, at —, because the Amendment was not intended "to restrict the right of the States to allocate their political power as they see fit." *Ante*, at —. Our own reading of the historical background, on the other hand, results in a somewhat imperfect picture of an era of constitutional confusion, confusion which the Amendment did little to resolve. As the leading constitutional historian of the Civil War has observed, constitutional law was characterized during the war years by "a noticeable

[35] Indeed, since the First Amendment is applicable to the States only through the Fourteenth, our Brother HARLAN's view would appear to allow a State to exclude any unpopular group from the political process solely upon the basis of its political opinions.

lack of legal precision" and by "[a] tendency toward irregularity . . . in legislation, and in legal interpretation." J. Randall, Constitutional Problems under Lincoln 515–516 (rev. ed. 1951). Nor would the postwar period of Reconstruction be substantially different.

For several decades prior to the Civil War, constitutional interpretation had been a pressing concern of the Nation's leading statesmen and lawyers, whose attention focused especially on the nature of the relationship of the States to the Federal Government. The onset of the Civil War served only to raise new problems upon which the original Constitution offered, at best, only peripheral guidance. The greatest problem of all, perhaps, was the character of the civil conflict—whether it was to be treated as a rebellion, as a war with a belligerent state, or as some combination of the two. Another issue concerned the scope of federal power to emancipate the slaves; even President Lincoln doubted whether his Emancipation Proclamation would be operative when the war had ended and his special war powers had expired. This particular issue was resolved by the Thirteenth Amendment, but that Amendment only raised new issues, for some men doubted the validity of even a constitutional change upon such a fundamental matter as slavery, particularly while the status of the eleven Confederate States remained unsettled. See *id.*, at 12–24, 59–73, 342–404.

The end of the war did not bring an end to difficult constitutional questions. Two perplexing problems remained. The one was the relation of the former Confederate States to the Federal Government; the other was the relation of the former slaves to the white citizens of the Nation. Both were intimately related to the politics of the day, an understanding of which is essential since the Fourteenth Amendment was presented to the

Nation as the Republican Party's solution for these problems. See J. James, The Framing of the Fourteenth Amendment 169–173 (1956) (hereafter James).

The starting point must be the key fact that, as of 1860, the Republicans were very much the Nation's minority party. Lincoln had won the presidency that year with less than 40% of the popular vote, while the Republicans had secured control of Congress only when southern Democrats had left Washington following the secession of their States. The compromise in the original Constitution, by which only three-fifths of the slaves in southern States were computed in determining representation in the House of Representatives and votes in the Electoral College also was a matter of critical importance in 1865; with slavery abolished, southern and hence Democratic power in the House and in the Electoral College would increase. The Republicans had calculated this matter rather carefully; as the *Chicago Tribune* had demonstrated as early as the summer of 1865, the increased southern delegation would need only 29 readily obtainable Democratic votes from the North in order to dominate the House. See James 21–23. But Republicans had no intention of permitting such a Democratic resurgence to occur; in their view, as one Republican Senator observed, Republicans would be "faithless" to their "trust," if they allowed "men who have thus proven themselves faithless" to recover "the very political power which they have hitherto used for the destruction of this Government." Cong. Globe, 39th Cong., 1st Sess. 2918 (remarks of Senator Willey) (1866) (hereafter Globe). Whether one looks upon such sentiments as a grasp for partisan political power or as an idealistic determination that the gains of the Civil War not be surrendered, the central fact remains that Republicans found it essential to bar or at least to delay the return of all-white southern delegations to Congress.

Temporarily, they proposed to do so by refusing to seat Congressmen from the seceded States. They usually justified their refusal on constitutional grounds, presenting a variety of theories as to how the former Confederate States had forfeited their rights by secession. See generally E. McKitrick, Andrew Johnson and Reconstruction 93–119 (1960). But exclusion of southern representatives could not be a permanent solution; a better solution seemed to be to elect at least some Republican representatives from the South by enfranchising the only class which could be expected to vote Republican in large numbers—the freedmen.

According to the census of 1860, Negroes had constituted some 4,200,000 out of the total population of 12,200,000 in the 15 slave States. In two States—Mississippi and South Carolina—Negroes were a substantial majority of the population, while in several other States the population was at least 40% Negro. Thus, Negro suffrage would probably result in a number of Negro and presumably Republican representatives from the South. The difficulty was with the means of bringing Negro suffrage about. Some, including Chief Justice Chase, looked back toward the Emancipation Proclamation and contended that Negro suffrage could be achieved, at least in the South, by means of a presidential proclamation. See James 5–7; 1 W. Fleming, Documentary History of Reconstruction 142 (1906). Others thought congressional legislation the appropriate vehicle for granting the suffrage, see James 13, 52–53; Van Alstyne, The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Supreme Court Review 33, 49–51, while still others argued for a constitutional amendment. See Cincinnati Commercial, Sept. 19, 1865, in James 11–12 (reporting speech of Congressman Bingham). Disagreement over

means, however, was but a minor obstacle in the path of equal suffrage; racial prejudice in the North was a far more significant one. Only five New England States and New York permitted any Negroes to vote as of 1866, see Van Alstyne, *supra*, at 70, and extension of the suffrage was rejected by voters in 17 of 19 popular referenda held on the subject between 1865 and 1868. Moreover, Republicans suffered some severe election setbacks in 1867 on account of their support of Negro suffrage. See W. Gillette, The Right to Vote 25–27, 32–38 (1969).

Meeting in the winter and spring of 1866 and facing elections in the fall of the same year, the Republicans in Congress thus faced a difficult dilemma: they desperately needed Negro suffrage in order to prevent total Democratic resurgence in the South, yet they feared that by pressing for suffrage they might create a reaction among northern white voters that would lead to massive Democratic electoral gains in the North. Their task was thus to frame a policy which would prevent total southern Democratic resurgence and which simultaneously would serve as a platform upon which Republicans could go before their northern constituents in the fall. What ultimately emerged as the policy and political platform of the Republican Party was the Fourteenth Amendment.[38]

As finally adopted, relevant portions of the Fourteenth Amendment read as follows:

> "Sec. 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

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[38] Republicans explicitly looked upon the Fourteenth Amendment as a political platform. See 2 F. Fessenden, Life and Public Services of William Pitt Fessenden 62 (1907); B. Kendrick (ed.), The Journal of the Joint Committee of Fifteen on Reconstruction 302 (1914). See also *post*, pp. ———.

State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Sec. 2. Representatives shall be apportioned among the several States according to their respective numbers. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

. . . . .

"Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The key provision on the suffrage question was, of course, § 2, which was to have the effect of reducing the representation of any State which did not permit Negroes to vote. Section 1 also began, however, as a provision aimed at securing equality of "political rights and privileges"—a fact hardly surprising in view of Republican concern with the question. In their earliest versions in the Joint Congressional Committee on Reconstruction, which framed the Fourteenth Amendment, §§ 1 and 2 read as follows:

"[Section 1.] Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property." B. Kendrick (ed.), The

Journal of the Joint Committee of Fifteen on Reconstruction 51 (1914) (hereafter Kendrick).

"[Section 2.] Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers of persons, deducting therefrom all of any race or color, whose members or any of them are denied any of the civil or political rights or privileges." *Id.*, at 43.

The question which must now be pursued is whether § 1 of the Amendment ever lost its original connection with the suffrage question.

It became evident at an early date that the Joint Committee did not wish to make congressional power over the suffrage more explicit than did the language of the original version of the future § 1. Six days after that section had been proposed by a subcommittee, the full committee refused to adopt an amendment offered by Senator Howard to make the section refer expressly to "political and *elective* rights and privileges," *id.*, at 55 (emphasis added), and refused as well to substitute for the language:

"Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States in each State the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty and property."

the following language offered by Congressman Boutwell:

"Congress shall have power to abolish any distinction in the exercise of the elective franchise in any State, which by law, regulation or usage may exist therein." *Id.*, at 54–55.

The committee did agree, however, to return the proposal to a special subcommittee, chaired by Congress-

man John A. Bingham, which at the next meeting of the full committee reported back the following language:

> "Congress shall have power to make all laws which shall be necessary and proper to secure all persons in every state full protection in the enjoyment of life, liberty and property; and to all citizens of the United States in any State the same immunities and also equal political rights and privileges." *Id.*, at 56.

This language, it seems clear, did not change the meaning of the section as originally proposed, but the next change in language, proposed several days later by Bingham, arguably did. Bingham moved the following substitute:

> "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment)." *Id.*, at 61.

This substitute was accepted by a committee vote of 7–6.

No record of the committee's debates have been preserved, and thus one can only guess whether Bingham's substitute was intended to change the meaning of the original proposal. The breakdown of the committee vote suggests, however, that no change in meaning was intended. The substitute was supported by men of all political views, ranging from Senator Howard and Congressman Boutwell, radicals who had earlier sought to make the section's coverage of suffrage explicit, to Congressman Rogers, a Democrat. Similarly, among the six voting against the substitute were a radical, Stevens; a moderate, Fessenden; and a Democrat, Grider. *Id.*,

at 61. Thus, while one might continue to argue that Bingham meant his substitute to do away with congressional power to legislate for the preservation of equal rights of suffrage, one can, with at least equal plausibility, contend that Bingham sought to do no more than substitute for his earlier specific language more general language which had already appeared elsewhere in the Constitution.[37]

Bingham's proposed amendment to the Constitution, as modified, was next submitted to the House of Representatives, where Republicans joined Democrats in attacking it. Republican Representative Hale of New York, for example, thought the amendment "in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden," Globe 1063, while Representative Davis, also a New York Republican, thought it would give Congress power to establish "perfect political equality between the colored and the white race of the South." *Id.*, at 1085. Meanwhile, the *New York Times*, edited by conservative Republican Congressman Henry J. Raymond, wondered if the proposed Amendment was "simply a preliminary to the enactment of negro suffrage." Feb. 19, 1866. Even the Amendment's supporters recognized that it would confer extensive power upon the Federal Government; Representative Kelley, a Pennsylvania radical, who supported the Amendment, concluded, after a lengthy discussion of the right of suffrage, that "the proposed amendment . . . [was] intended to secure it." Globe 1063. Its proponents, however, could not secure the necessary support for the Amendment in the House and thus were compelled to postpone the matter until a later date, when they failed to bring it again to the floor. Kendrick 215.

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[37] The language appears earlier in Art. IV, § 2.

Meanwhile, the Joint Committee had returned to work and had begun to consider the direct antecedent of the Fourteenth Amendment, a proposal by Robert Dale Owen which Representative Stevens had placed before the committee. Its relevant provisions were as follows:

> "Section 1. No discrimnation shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude.
>
> "Sec. 2. From and after the fourth day of July, in the year one thousand eight hundred and seventy-six, no discrimination shall be made by any state, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude.
>
> "Sec. 3. Until the fourth day of July, one thousand eight hundred and seventy-six, no class of persons, as to the right of any of whom to suffrage discrimination shall be made by any state, because of race, color, or previous condition of servitude, shall be included in the basis of representation.
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> . . . . .
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> "Sec. 5. Congress shall have power to enforce by appropriate legislation, the provisions of this article." *Id.*, at 83–84.

Congressman Bingham had not, however, given up on his own favorite proposal, and he immediately moved to add the following new section to the Amendment:

> "Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*, at 87.

His motion was adopted on a 10-to-2 party line vote, but its adoption was only the beginning of some intricate and inexplicable maneuvering. Four days later, Senator Williams, an Oregon radical, moved to delete Bingham's section, and his motion was carried by a vote of 7 to 5, with radicals Howard and Boutwell and Democrats Grider and Johnson voting for the motion and Stevens, Bingham, and Democrat Rogers voting against. Bingham then moved to submit his proposal as a separate amendment, but he was supported only by the three Democrats on the committee. The committee then agreed to submit the Owen proposal to Congress with only slight modifications, but postponed the submission until after one further meeting to be held three days hence. *Id.*, at 98–100.

At this meeting, the proposed Fourteenth Amendment was substantially rewritten. First, the committee, by a vote of 12 to 2, deleted § 2, which had barred States from making racial discriminations in the enjoyment of the right of suffrage after 1876, and conformed § 3, so as to insure that it would remain in effect after 1876. After making numerous other changes, the committee then concluded its deliberations by replacing Owen's ban in § 1 on discrimination "as to civil rights" with Bingham's now familiar language. Here the vote was 10 to 3, with the majority again containing a full spectrum of political views. *Id.*, at 100–106. The reasons for the rewriting are not entirely clear. The only known explanation was given by Owen in 1875, when he wrote an article recalling a contemporary conversation with Stevens; Stevens had reportedly explained that the committee's original decisions had "got noised abroad," and that, as a result, several state delegations had held caucuses which decided that the explicit references to "negro suffrage, in any shape, ought to be excluded from the platform. . . ." Quoted in *id.*, 302. Thus, the provision for suffrage after

1876 had to be eliminated, but Stevens did not explain why Bingham's version of § 1 was then substituted for Owen's version. Perhaps the changes in § 1 of the Amendment were thought by the committee to be mere linguistic improvements which did not substantially modify Owen's meaning and which did not extend its coverage to political as distinguished from civil rights. But, at the very least the committee must have realized that it was substituting for Owen's rather specific language Bingham's far more elastic language—language which, as one scholar has noted, is far more "capable of growth" and "receptive to 'latitudinarian' construction." Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 61, 63 (1955). It is, moreover, at least equally plausible that the committee meant to substitute for Owen's narrow provision dealing solely with civil rights a broader provision which had originated and been understood only two months earlier as protecting equality in the right of suffrage as well as equality of civil rights.

The purpose of § 1 in relation to the suffrage emerges out of the debates on the floor of Congress with an equal obscurity. In the search for meaning one must begin, of course, with the statements of leading men in Congress, such as Bingham and Howard. Bingham, for one, stated without apparent equivocation that "[t]he amendment does not give . . . the power to Congress of regulating suffrage in the several States." Globe 2542. Similarly, Senator Howard, after noting that the Amendment would accord to Negroes the same protection in their fundamental rights as the law gave to whites, explicitly cautioned that "the first section of the proposed amendment does not give to either of these classes the right of voting." Globe 2766.[38] But such statements are not

[38] As the statements of Bingham and Howard in the text indicate, the framers of the Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the

as unambiguous as they initially appear to be. Thus, Howard, with that "lack of legal precision" typical of the period, stated that the right of suffrage was not one of the privileges and immunities protected by the Constitution, Globe 2766, immediately after he had read into the record an excerpt from the case of *Corfield* v. *Coryell*, 6 F. Cas. 546 (No. 3230) (CCED Pa. 1823), an excerpt which listed the elective franchise as among the privileges and immunities. Globe 2765. Bingham was equally ambiguous, for he too thought that the elective franchise was a constitutionally protected privilege and immunity. Globe 2542. Indeed, at one point in the debates, Bingham made what is for us a completely incongruous statement:

> "To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States." Globe 2542.

Bingham, that is, seemed to say in one breath first, that the franchise was a constitutionally protected privilege in support of which Congress under § 5 of the Fourteenth Amendment could legislate and then, in the next breath, that the franchise was exclusively under the control of the States.

Bingham's words make little sense to modern ears; yet, when they were uttered, his words must have made some sense, at least to Bingham and probably to many of his listeners. The search for their meaning probably ought to begin with Art. IV, § 2—the Privileges and

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courts, which the courts would use to achieve equality of rights. Since § 5 is clear in its grant of power to Congress and we have consistently held that the Amendment grants power to the courts, this issue is of academic interest only.

Immunities Clause of the original Constitution. In the minds of members of the Thirty-Ninth Congress, the leading case to construe that clause was *Corfield* v. *Coryell, supra,* which had listed among a citizen's privileges and immunities "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised." 6 F. Cas., at 552. Here again is the same apparent ambiguity that later occurred in Bingham's thought—that the franchise is a federally protected right, but only to the extent it is regulated and established by state law. The ambiguity was, however, only apparent and not real, for the Privileges and Immunities Clause of the original Constitution served a peculiar function; it did not create absolute rights but only placed a noncitizen of a State "upon a perfect equality with its own citizens" as to those fundamental rights already created by state law. *Scott* v. *Sandford,* 19 How. 393, 407 (1857). Accord, *id.,* at 584 (dissenting opinion). The Privileges and Immunities Clause, that is, was a sort of equal protection clause adopted for the benefit of out-of-state citizens; [39] it required, for example, that if a State gave its own citizens a right to enter into a lawful business, it could not arbitrarily deny the same right to out-of-state citizens solely because they came from out of State. See *Ward* v. *Maryland,* 12 Wall. 418, 430 (1871). Thus, what Bingham may have meant in indicating that the franchise was included within the scope of the Privileges and Immunities Clause of the Fourteenth Amendment while remaining entirely under the control of the States was that, although the States would be free in general to confer the franchise upon whomever they chose, Congress would have power to bar them from racial or other arbitrary discrimina-

[39] According to *Paul* v. *Virginia,* 8 Wall. 168, 180 (1869), the Privileges and Immunities Clause in Art. 4, § 2, secured to citizens "in other States the equal protection of their laws."

tions in making their choices. In short, the Privileges and Immunities Clause might for Bingham have meant the same as the Equal Protection Clause; as he later explained in a campaign speech, § 1 was nothing but "a simple, strong, plain declaration that equal laws and equal and exact justice shall hereafter be secured within every State of this Union . . . ." Cincinnati Commercial, Aug. 27, 1866, quoted in James 160–161.

One way, then, to reconcile the seemingly incongruous statements of Bingham is to read him as understanding that, while the Fourteenth Amendment did not take from the States nor grant to Congress plenary power to regulate the suffrage, it did give Congress power to invalidate discriminatory state legislation. In his words, the Amendment took "from no State any right which hitherto pertained to the several States of the Union, but it impose[d] a limitation upon the States to correct their abuses of power." *Ibid.* Others had a similar understanding. Thus, for Charles Sumner, "Equality of *political rights* . . . [did] not involve necessarily what is sometimes called the 'regulation' of the suffrage by the National Government, although this would be best, . . . [but] simply require[d] the abolition of any discrimination among citizens, inconsistent with Equal Rights." C. Sumner, Are We a Nation 34 (1867). Or, as Stevens explained in presenting the Amendment to the House, it merely allowed "Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all." Globe 2459 (emphasis in original). Clearest of all, perhaps was Thomas M. Cooley in the 1871 edition of his *Constitutional Limitations*, where he wrote:

> "This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States;

its object is to preclude legislation by any State which shall 'abridge the privileges or immunities of citizens of the United States,' or 'deprive any person of life, liberty, or property without due process of law,' or 'deny to any person within its jurisdiction the equal protection of the laws'; and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual." T. Cooley, Constitutional Limitations 294 (3d ed. 1871).

There is also other evidence that at least some members of Congress and of the electorate believed that § 1 of the Fourteenth Amendment gave Congress power to invalidate discriminatory state regulations of the suffrage. Thus, Congressman Rogers, a Democrat who had served on the Joint Committee, agreed with Bingham and Howard that "[t]he right to vote is a privilege," Globe 2538, while Congressman Boyer, another Democrat, feared that § 1 was "intended to secure ultimately, and to some extent indirectly, the political equality of the negro race." Globe 2467. A third Democrat, Congressman Niblack, thought the section sufficiently ambiguous to warn that he might, although in fact he never did, offer the following addition to it:

> "*Provided*, That nothing contained in this article shall be so construed as to authorize Congress to regulate or control the elective franchise within any State, or to abridge or restrict the power of any State to regulate or control the same within its own jurisdiction, except as in the third section hereof prescribed." Globe 2465.

Republicans also alluded on occasion to their belief that the Amendment might give Congress power to prevent discrimination in regard to the suffrage. Radical Senator Stewart, for example, while unhappy that

the Amendment did not directly confer suffrage, nevertheless could "support this plan" because it did "not preclude Congress from adopting other means by a two-thirds vote,[40] when experience shall have demonstrated, as it certainly will, the necessity for a change of policy. In fact it furnishes a conclusive argument in favor of universal amnesty and impartial suffrage." Globe 2964. Likewise, the more conservative Congressman Raymond of New York supported the first section because he thought Congress should have the power to legislate on behalf of equal rights "in courts and elsewhere," Globe 2513, after the radical Congressman Wilson of Iowa had informed him that, "if we give a reasonable construction to the term 'elsewhere,' we may include in that the jury box and the ballot-box." Globe 2505. Congressman Stevens, meanwhile, was informing Congress that "if this amendment prevails you must legislate to carry out many parts of it," Globe 2544, and was looking forward to "further legislation; in enabling acts or other provisions," Globe 3148, while even the Joint Committee submitted the Amendment to the Nation "in the hope that its imperfections may be cured, and its deficiencies supplied, by legislative wisdom. . . ." Report of the Joint Committee on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., at xxi (1866). Nor did the radical Republican press disagree; as the Lansing State Republican argued in its editorial columns, even "[i]f impartial suffrage, the real vital question of the whole struggle . . . [was] postponed through the mulish obstinacy of Andrew Johnson," "freedom" would "triumph by the adoption of the proposed amendment" and would be followed by "equal

[40] Senator Stewart's statement regarding the two-thirds requirement appears to refer to § 3 of the Fourteenth Amendment, which requires such a majority for legislation granting amnesty to former Confederate leaders.

rights to all. . . ." July 11, 1866. And, of course, once the Amendment had been ratified, Republicans in Congress began to make speeches in favor of legislation which would implement the Amendment by guaranteeing equal suffrage. See, *e. g.*, Globe, 40th Cong., 2d Sess., 1966–1967 (1868) (remarks of Congressman Stevens); 3d Sess., 1008 (1869) (remarks of Senator Sumner).

Of course, few of the above statements taken from congressional debates, campaign speeches, and the press were made with such clarity and precision that we can know with certainty that its framers intended the Fourteenth Amendment to function as we think they did. But clarity and precision are not to be expected in an age when men are confronting new problems for which old concepts do not provide ready solutions. As we have seen, the 1860's were such an age, and the men who formulated the Fourteenth Amendment were facing an especially perplexing problem—that of creating federal mechanisms to insure the fairness of state action without in the process destroying the reserved powers of the States. It would, indeed, be surprising if the men who first faced this difficult problem were possessed of such foresight that they could debate its solution with complete clarity and consistency and with uniformity of views. There is, in short, every reason to believe that different men reconciled in different and often imprecise ways the Fourteenth Amendment's broad guarantee of equal rights and the statements of some of its framers that it did not give Congress power to legislate upon the suffrage.

Some men, for example, might have reconciled the broad guarantee and the narrow language by concluding that Negroes were not yet ready to exercise the franchise and hence that a State would not act arbitrarily in denying it to them while granting it to whites. As

the debates make clear, proponents of the Amendment did not understand the Equal Protection Clause to forbid States to distinguish among persons where justification for distinctions appeared. See, *e. g.*, Globe 1064 (Congressman Stevens). At the time the Fourteenth Amendment was adopted, the overwhelming majority of Negro residents of the United States were former slaves living in the Southern States. Most of them were illiterate and uneducated. Except for those few who had been kidnaped by slave traders after reaching adulthood, they had no prior experience with the responsibilities of citizenship. Given this state of affairs, it would hardly be surprising if some of the framers of the Fourteenth Amendment felt that the Equal Protection Clause would not forbid the States from classifying Negroes as a group to be denied the right to vote. Equal protection has never been thought to require identical treatment of all persons in all respects. *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 583–584 (1935), and cases cited. It requires only that the State provide adequate justification for treating one group differently from another. *Levy* v. *Louisiana*, 391 U. S. 68 (1968). Entirely aside from any concepts of racial inequality that may have been held by some members of Congress at that time, it seems clear that many members had serious reservations about the ability of the majority of Negroes, after centuries of slavery, to cast an intelligent and responsible vote. See, for example, the debates over a proposal to enfranchise Negroes in the District of Columbia in Cong. Globe, 38th Cong., 1st Sess., 2140–2141, 2239–2243, 2248 (1864). Of course, we would not now hold that even the situation existing in 1866 would justify wholesale exclusion of Negroes from the franchise: our decisions have consistently held that a particular group may not be denied the right to vote merely because many, or even most of its members could properly be excluded. *Carrington* v. *Rash*, 380 U. S. 89,

93–96 (1965); *Kramer* v. *Union Free School District*, 395 U. S. 621, 632–633 (1969); *Evans* v. *Cornman*, 398 U. S. 419, 424–426 (1970); cf. Tussman and TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 351–352 (1949). But mere administrative convenience was once thought to be sufficient justification for an overly broad legislative classification, so long at least as the resultant discrimination could be justified as to a majority of the class affected. *Terrace* v. *Thompson*, 263 U. S. 197, 218–222 (1923); cf. *Kotch* v. *Board of River Pilot Commissioners*, 330 U. S. 552 (1947). Rejection of this approach has been the result of a judicial development that could hardly have been known to the framers of the Amendment. Cf. *Baxstrom* v. *Herold*, 383 U. S. 107, 114–115 (1966).

Of course, many Americans in the 1860's rejected imputations that Negroes were unready for the franchise and thus concluded that distinctions between the races in regard to the franchise would constitute denials of equal protection. Congressman Stevens, for one, had no doubt that to allow a State to deny the franchise to Negroes would be to allow it "to discriminate among the same class." Globe 2460. And Negroes, of course, indignantly rejected such imputations, arguing that "[w]e are not all so illiterate as you suppose" and that "even if we were, our instincts have proved better than that 'educated class,' whose 'little learning' prompted them to attempt the impossible thing of destroying this great Republic. . . ." Letter to the Editor, N. Y. Times, Nov. 4, 1866.

Among the men who refused to regard Negroes as ill prepared for the exercise of the franchise, there may have been some who did not understand the subtle distinctions of constitutional lawyers such as Bingham and who thus accepted at face value assurances that the Fourteenth Amendment gave Congress no power over the suffrage. As a result, at least three identifiable groups may have

existed within the Republican majorities which enacted and ratified the Amendment—those who thought that Congress would have power to insure to Negroes the same right to suffrage which the States gave to whites, those who thought that Congress would not have such power since Negroes and whites constituted distinct and dissimilar classes for voting purposes, and those who thought Congress would possess no power at all over the suffrage. Perhaps all three such groups did not exist in 1866 in Congress and in the Nation at large, but surely the evidence is not clear "beyond any reasonable doubt" that the only existent group was the last one, consisting of men who, despite the broad langauge of § 1 and the hints by speakers of its applicability to the suffrage, simply assumed without developing any analytical framework in support of their assumption that the section would not be so applied.

The evidence, in sum, plausibly suggests that the men who framed the Fourteenth Amendment possessed differing views as to the limits of its applicability but that they papered over their differences because those differences were not always fully apparent and because they could not foresee with precision how their amendment would operate in the future. Moreover, political considerations militated against clarification of issues and in favor of compromise. Much of the North, as already noted, opposed Negro suffrage, and many Republicans in Congress had to seek reelection from constituencies where racial prejudice remained rampant. Republicans in the forthcoming elections thus found it convenient to speak differently before different constituencies; as the Republican state chairman of Ohio wrote, in northern counties of the State "some of our Speakers have openly advocated impartial suffrage, while in other places it was thought necessary, not only to repudiate it but to oppose it." B. R. Cowan to S. P. Chase, Oct. 12, 1866, quoted in James 168. Similarly, Senator Wilson of Massachu-

setts, when accused shortly after the 1866 elections of misrepresenting the issues of the campaign in Delaware by saying nothing of Negro suffrage, replied that since he had been "in a State where not much progress had been made, I acted somewhat on the scriptural principle of giving 'milk to babes.'" Globe, 39th Cong., 2d Sess., 42. Apparently Congressman Ashley of Ohio acted upon similar principles, for when he was asked after the House had initially approved the Amendment whether Congress had "power to confer the right of suffrage upon negroes in the States," he responded,

> "Well, sir, I do not intend to put myself on record against the right of Congress to do that. I am not prepared now to argue the point with my colleague; but I will say to him that when the time comes for the American Congress to take action on the question, I will be ready to speak. I will not say now whether I would vote for or against such a proposition." Globe 2882.

Thus, precise legal analysis and clarity of thought were both intellectually difficult and politically unwise. What Republicans needed, in the words of Wendell Phillips, the former abolitionist leader, was "a party trick to tide over the elections and save time," after which they could "float back into Congress, able to pass an act that shall give the ballot to the negro and initiate an amendment to the Constitution which shall secure it to him." Speech of Wendell Phillips, July 4, 1866, quoted in A. Harris, A Review of the Political Conflict in American, 437 (1876). Similiarly, the *New York Times*, edited by Congressman Henry J. Raymond, a conservative Republican who ultimately would support the Amendment, observed that "all the excitement that had been raised about constitutional amendments . . . has been simply dust thrown in the eyes of the public to cover the approach to the grand fundamental, indispensable principle of

universal negro suffrage . . . ." April 27, 1866, quoted in A. Harris, *supra*, at 433.

Not surprisingly, the product of such political needs was an Amendment which contemporaries saw was vague and imprecise. Democratic Senator Hendricks, for example, protested that he had "not heard any Senator accurately define, what are the rights and immunities of citizenship," Globe 3039, while Congressman Boyer, another Democrat, found the first section "objectionable also in its phraseology, being open to ambiguity and admitting of conflicting constructions." Globe 2467. Republicans too were aware of the Amendment's vagueness. Thus, when he presented the Amendment to the Senate, Senator Howard noted that "[i]t would be a curious question to solve what are the privileges and immunities of citizens" and proposed not to consider the question at length, since "[i]t would be a somewhat barren discussion." Instead, like the pre-Civil War Supreme Court,[41] he "very modestly declined to go into a definition of them, leaving questions arising under the clause to be discussed and adjudicated when they should happen practically to arise." Globe 2765.

Thus, the historical evidence does not point to a single, clear-cut conclusion that contemporaries viewed the first section of the Fourteenth Amendment as an explicit abandonment of the radical goal of equal suffrage for Negroes. Rather the evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with

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[41] This Court had taken such an approach in *Conner* v. *Elliott*, 18 How. 591 (1856).

future vision and future needs the issues which they left unresolved. Such an hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political." [42]

Nor is such an hypothesis inconsistent with the subsequent enactment of the Fifteenth, Nineteenth, and Twenty-fourth Amendments. Those who submitted the Fifteenth Amendment to the States for ratification could well have desired that any prohibition against racial discrimination in voting stand upon a firmer foundation than mere legislative action capable of repeal [43] or the vagaries of judicial decision.[44] Or they could merely have concluded that, whatever might be the case with other rights, the right to vote was too important to allow disenfranchisement of any person for no better reason than that others of the same race might not be qualified. At least some of the supporters of the Nineteenth Amendment believed that sex discrimination in voting was itself proscribed by the Fourteenth Amendment's guarantee of equal protection. 57 Cong. Rec. 3053 (Feb-

[42] Ironically, the same distinction between "political" and other rights was drawn by this Court in *Plessy* v. *Ferguson*, 163 U. S. 537, 545–546 (1896). But the Court there concluded, directly contrary to our Brother HARLAN's position, that the Fourteenth Amendment applied to "political" rights and to those rights only.

[43] As Thaddeus Stevens had pointed out in urging passage of the Fourteenth Amendment despite the fact that, he felt, some of its guarantees could be enforced by mere legislative enactment, "a law is repealable by a majority." Globe 2549.

[44] Radical disenchantment with decisions of this Court had led, prior to the Fifteenth Amendment, to the Act of March 27, 1868, 15 Stat. 44, withdrawing our appellate jurisdiction over certain habeas corpus cases. See *Ex parte McCardle*, 7 Wall. 506, 508, 514–515 (1868).

ruary 10, 1919). And finally, the Twenty-fourth Amendment was not proposed to the States until this Court had held, in *Breedlove* v. *Suttles*, 302 U. S. 277 (1937),[45] that state laws requiring payment of a poll tax as a prerequisite to voting did not *ipso facto* violate the Equal Protection Clause. Accordingly, we see no reason that the mere enactment of these amendments can be thought to imply that their proponents believed the Fourteenth Amendment did not apply to state allocations of political power. At a dubious best, these amendments may be read as implying that their proponents felt particular state allocations of power a proper exercise of power under the Equal Protection Clause.

Nor do we find persuasive our Brother HARLAN's argument that § 2 of the Fourteenth Amendment was intended as an exclusive remedy for state restrictions on the franchise, and that therefore any such restrictions are permissible under § 1. As Congressman Bingham emphatically told the House, when the same argument was made by Congressman Bromwell,

> "there has not been such a construction, in my opinion, of a law which imposes only a penalty, for centuries, if ever, in any country where the common law obtains. The construction insisted upon by the gentleman amounts to this, that a law which inflicts a penalty or works a forfeiture for doing an act, by implication authorizes the act to be done for doing which the penalty is inflicted. There cannot be such a construction of the proviso. It is a penalty. It says in terms that if any of the States of the United States shall disobey the Constitution; . . . that as a penalty such State shall lose political power in this House . . . .

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[45] *Breedlove* has been overruled by *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 669 (1966).

"You place upon your statute-book a law punishing the crime of murder with death. You do not thereby, by implication, say that anybody may, of right, commit murder. You but pass a penal law. You do not prohibit murder in the Constitution; you guaranty life in the Constitution. You do not prohibit the abuse of power by the majority in the Constitution in express terms, but you guaranty the equal right of all free male citizens of full age to elect Representatives; and by the proviso you inflict a penalty upon a State which denies or abridges that right on account of race or color. In doing that we are not to be told that we confer a power to override the express guarantees of the Constitution. We propose the penalty in aid of the guarantee, not in avoidance of it." Globe 431–432; see Van Alstyne, *supra*, at 48–68.

It may be conceivable that § 2 was intended to be the sole remedy available when a State deprived its citizens of their right to vote, but it is at least equally plausible that congressional legislation pursuant to §§ 1 and 5 was thought by the framers of the Amendment to be another potential remedy. Section 2, in such a scheme, is hardly superfluous: it was of critical importance in assuring that, should the Southern States deny the franchise to Negroes, the Congress called upon to remedy that discrimination would not be controlled by the beneficiaries of discrimination themselves. And it could, of course, have been expected to provide at least a limited remedy in the event that both Congress and the courts took no action under § 1. Neither logic nor historical evidence compellingly suggests that § 2 was intended to be more than a remedy supplementary, and in some conceivable circumstances indispensable, to other congressional and judicial remedies available under §§ 1 and 5. See generally, Van Alstyne, *supra*.

The historical record left by the framers of the Fourteenth Amendment, because it is a product of differing and conflicting political pressures and conceptions of federalism, is thus too vague and imprecise to provide us with sure guidance in deciding the pending cases. We must therefore conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations. We would be remiss in our duty if, in an attempt to find certainty amidst uncertainty, we were to misread the historical record and cease to interpret the Amendment as this Court has always interpreted it.

D

There remains only the question whether Congress could rationally have concluded that denial of the franchise to citizens between the ages of 18 and 21 was unnecessary to promote any legitimate interests of the States in assuring intelligent and responsible voting. There is no need to set out the legislative history of Title III at any great length here.[46] Proposals to lower the voting age to 18 had been before Congress at several times since 1942.[47] The Senate Subcommittee on Constitutional Amendments conducted extensive hearings on the matter in 1968 and again in 1970,[48] and the question

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[46] For a full collection of the relevant materials, see Note, Legislative History of Title III of the Voting Rights Act of 1970, 8 Harv. J. Legis. — (1970).

[47] See 88 Cong. Rec. 8312, 8316 (1942).

[48] Hearings on S. J. Res. 8, 14, and 78 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968); Hearings on S. J. Res. 147 and Others before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970) (hereafter 1970 Hearings).

was discussed at some length on the floor of both the House and the Senate.

Congress was aware, of course, of the facts and state practices already discussed.[49] It was aware of the opinion of many historians that choice of the age of 21 as the age of maturity was an outgrowth of medieval requirements of time for military training and development of a physique adequate to bear heavy armor.[50] It knew that whereas only six percent of 18-year-olds in 1900 had completed high school, 81 percent have done so today.[51] Congress was aware that 18-year-olds today make up a not insubstantial proportion of the adult work force; [52] and it was entitled to draw upon its experience in supervising the federal establishment to determine the competence and responsibility with which 18-year-olds perform their assigned tasks. As Congress recognized, its judgment that 18-year-olds are capable of voting is consistent with its practice of entrusting them with the heavy responsibilities of military service. See § 301 (a) (1) of the Amendments.[53] Finally, Congress was presented with evidence that the age of social and biological maturity in modern society has been consistently decreasing. Dr. Margaret Mead, an anthropoligist, testified that in the past century, the "age of physical maturity has been dropping and has dropped over 3

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[49] *Ante*, at —.

[50] See 116 Cong. Rec. 3503 (daily ed., Mar. 11, 1970); James, The Age of Majority, 4 Am. J. Legal History 22 (1960); Report of the Committee on the Age of Majority Presented to the English Parliament, p. 21 (1967).

[51] 116 Cong. Rec. 3216 (daily ed., Mar. 9, 1970).

[52] 16 Department of Labor, Bureau of Labor Statistics, Employment and Earnings, table A–3 (June 1970).

[53] See also Senate Hearings, *supra* n. 9, at 323 (Senator Kennedy), 116 Cong. Rec. 2938–2939 (daily ed., March 4, 1970) (Senator Mansfield); 3214 (daily ed., March 9, 1970) (Senator Cook). See generally Note, *supra* n. 46, at — — —.

years." [54] Many Senators and Representatives, including several involved in national campaigns, testified from personal experience that 18-year-olds of today appeared at least as mature and intelligent as 21-year-olds in the congressmen's youth.[55]

Finally, and perhaps most important, Congress had before it information on the experience of two States, Georgia and Kentucky, which have allowed 18-year-old voting since 1943 and 1955, respectively. Every elected representative from those States who spoke to the issue agreed that, as Senator Talmadge stated, "young people [in these States] have made the sophisticated decisions and have assumed the mature responsibilities of voting. Their performance has exceeded the greatest hopes and expectations." [56]

In sum, Congress had ample evidence upon which it could have based the conclusion that exclusion of citizens 18 to 21 years of age from the franchise is wholly unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting. See *Katzenbach* v. *Morgan*, 384 U. S., at 653–656. If discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional under the Equal Protection Clause, and Congress has ample power to forbid it under § 5 of the Fourteenth Amendment. We would uphold § 302 of the 1970 Amendments as a legitimate exercise of congressional power.

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[54] 1970 Hearings at 223. Dr. W. Walter Menninger, a psychiatrist, and Dr. S. I. Hayakawa, agreed. *Id.*, at 23, 36.

[55] *E. g.*, 116 Cong. Rec. 2939 (daily ed., Mar. 4, 1970) (Senator Mansfield); 3214–3215 (daily ed., Mar. 9, 1970) (Senator Cook); 3216–3219 (daily ed., Mar. 9, 1970) (Senator Goldwater); 3477 (daily ed., Mar. 11, 1970) (Senator Talmadge, joined by Senator Ervin); 3497–3498 (daily ed., Mar. 11, 1970) (Senator Tydings).

[56] 116 Cong. Rec. 3477 (daily ed., Mar. 11, 1970).

SUPREME COURT OF THE UNITED STATES

Nos. 43, 44, 46, 47 Orig.—October Term, 1970

43	State of Oregon, Plaintiff, v. John N. Mitchell, Attorney General of the United States.	On Bills of Complaint.
44	State of Texas, Plaintiff, v. John N. Mitchell, Attorney General of the United States.	
46	United States, Plaintiff, v. State of Arizona.	
47	United States, Plaintiff, v. State of Idaho.	

[December 21, 1970]

Mr. Justice Stewart, with whom The Chief Justice and Mr. Justice Blackmun join, concurring in part and dissenting in part.

In these cases we deal with the constitutional validity of three provisions of the Voting Rights Act Amendments of 1970. Congress undertook in these provisions: (a) to abolish for a five-year period all literacy tests and similar voting eligibility requirements imposed by any State in the Union (§ 201); (b) to remove the restrictions imposed by state durational residency requirements upon voters in presidential elections (§ 202); and (c) to reduce the voting age to a maximum of 18 years for all voters in all elections throughout the Nation (§ 302). The Court today upholds § 201's nationwide literacy test

ban and § 202's elimination of state durational residency restrictions in presidential elections. Section 302's extension of the franchise to 18-year-old voters is, by virtue of the prevailing opinion of MR. JUSTICE BLACK, upheld as applied to federal elections. I agree with the Court in sustaining the congressional ban on state literacy tests, for substantially the same reasons relied upon by MR. JUSTICE BLACK. I also agree that the action of Congress in removing the restrictions of state residency requirements in presidential elections is constitutionally valid, but I base this judgment upon grounds quite different from those relied upon by MR. JUSTICE BLACK. And finally, I disagree with the Court's conclusion that Congress could constitutionally reduce the voting age to 18 for federal elections, since I am convinced that Congress was wholly without constitutional power to alter—for the purpose of *any* elections—the voting age qualifications now determined by the several States.

Before turning to a discussion of my views, it seems appropriate to state that we are not called upon in these cases to evaluate or appraise the wisdom of abolishing literacy tests, of altering state residency requirements, or of reducing the voting age to 18. Whatever we may think as citizens, our single duty as judges is to determine whether the legislation before us was within the constitutional power of Congress to enact. I find it necessary to state so elementary a proposition only because certain of the separate opinions filed today contain many pages devoted to a demonstration of how beneficent are the goals of this legislation, particularly the extension of the electoral franchise to young men and women of 18. A casual reader could easily get the impression that what we are being asked in these cases is whether or not we think allowing people 18 years old to vote is a good idea. Nothing could be wider of the mark. My Brothers to

the contrary, there is no question here as to the "judgment" of Congress; there are questions only of Congress' constitutional power.

I

I concur in Part II of MR. JUSTICE BLACK'S opinion, which holds that the literacy test ban of § 201 of the 1970 Amendments is constitutional under the Enforcement Clause of the Fifteenth Amendment. Our decisions establish that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It is onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson*, 307 U. S. 268, 275; cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339. Because literacy and illiteracy are seemingly neutral with respect to race, creed, color, and sex, we upheld a literacy requirement against a claim that it was invalid on its face under the Fifteenth Amendment. *Lassiter* v. *Northampton Election Board*, 360 U. S. 45. But in *Gaston County* v. *United States*, 395 U. S. 285, we made it clear that Congress has ample authority under § 2 of the Fifteenth Amendment to determine that literacy requirements work unfairly against Negroes in practice because they handicap those Negroes who have been deprived of the educational opportunities available to white citizens. We construed the 1965 Voting Rights Act in light of the Report of the Senate Judiciary Committee that said, "[T]he educational differences between whites and Negroes in the areas to be covered by the prohibitions—differences which are reflected in the record before the committee—would mean that equal application of the tests would abridge 15th amendment rights." S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 16. See also *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315.

Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution.

Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings concerning either the equality of educational opportunity or actual impact of literacy requirements on the Negro citizen's access to the ballot box. In the interests of uniformity, Congress may paint with a much broader brush than may this Court,

which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. Cf. *Lassiter* v. *Northampton Election Board, supra.* The findings that Congress made when it enacted the Voting Rights Act of 1965 would have supported a nationwide ban on literacy tests. Instead, at that time "Congress chose to limit its attention to the geographic areas where immediate action seemed necessary." *South Carolina* v. *Katzenbach,* 383 U. S. 301, 328. Experience gained under the 1965 Act has now led Congress to conclude that it should go the whole distance. This approach to the problem is a rational one; consequently it is within the constitutional power of Congress under § 2 of the Fifteenth Amendment.

II

Section 202 of the Voting Rights Act Amendments of 1970 is a comprehensive provision aimed at insuring that a citizen will not be deprived of the opportunity to vote for the offices of President and Vice President because of a change of residence. Those who take up a new residence more than 30 days before a presidential election are guaranteed the right to register and vote in the State to which they have moved notwithstanding any durational residency requirement imposed by state law, provided, of course, that they are otherwise qualified to vote. Those who take up a new residence less than 30 days before a presidential election are guaranteed the right to vote, either in person or by absentee ballot, in the State from which they have moved, provided that they satisfied, as of the date of their change of residence, the requirements to vote in that State.

A

Congress, in my view, has the power under the Constitution to eradicate political and civil disabilities which

arise by operation of state law following a change in residence from one State to another. Freedom to travel from State to State—freedom to enter and abide in any State in the Union—is a privilege of United States citizenship. *Shapiro* v. *Thompson*, 394 U. S. 618; *United States* v. *Guest*, 383 U. S. 745, 757–760; *Truax* v. *Raich*, 239 U. S. 33, 39; *Twining* v. *New Jersey*, 211 U. S. 78, 97; *Crandall* v. *Nevada*, 6 Wall. 35. Section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." In discussing the privileges of citizens of the United States within the meaning of § 1, Mr. Justice Miller wrote for the Court in the *Slaughter-House Cases:*

> "One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." 16 Wall. 36, 80.

Although § 5 of the Fourteenth Amendment confers on Congress the "power to enforce, by appropriate legislation, the provisions of this article," this Court has sustained the power of Congress to protect and facilitate the exercise of privileges of United States citizenship without reference to § 5. *United States* v. *Guest*, 383 U. S., at 757–760; *United States* v. *Classic*, 313 U. S. 299; *Burroughs* v. *United States*, 290 U. S. 534. These cases and others establish that Congress brings to the protection and facilitation of the exercise of privileges of United States citizenship all of its power under the Necessary and Proper Clause. Consequently, as against the re-

served power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

In the light of these considerations, § 202 presents no difficulty. Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State. The objective of § 202 is clearly a legitimate one. Federal action is required if the privilege to change residence is not to be undercut by parochial local sanctions. No State could undertake to guarantee this privilege to its citizens. At most a single State could take steps to resolve that its own laws would not unreasonably discriminate against the newly arrived resident. Even this resolve might not remain firm in the face of discriminations perceived as unfair against those of its own citizens who moved to other States. Thus, the problem could not be wholly solved by a single State, or even by several States, since every State of new residence and every State of prior residence would have a necessary role to play. In the absence of a unanimous interstate compact, the problem could only be solved by Congress. Quite clearly, then, Congress has acted to protect a constitutional privilege which finds its protection in the Federal Government and is national in character. *Slaughter-House Cases*, 16 Wall., at 79.

B

But even though general constitutional power clearly exists, Congress may not overstep the letter or spirit of any constitutional restriction in the exercise of that power. For example, Congress clearly has power to regulate interstate commerce, but it may not, in the exercise of that power, impinge upon the guarantees of the Bill

of Rights. I have concluded that, while § 202 applies only to presidential elections, nothing in the Constitution prevents Congress from protecting those who have moved from one State to another from disenfranchisement in any federal election, whether congressional or presidential.

The Constitution withholds from Congress any general authority to change by legislation the qualifications for voters in federal elections. The meaning of the applicable constitutional provisions is perfectly plain. Article I, § 2, and the Seventeenth Amendment prescribe the qualifications for voters in elections to choose Senators and Representatives: they "shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." The Constitution thus adopts as the federal standard the standard which each State has chosen for itself. *Ex parte Yarbrough,* 110 U. S. 651, 663; *Wiley* v. *Sinkler,* 179 U. S. 61, 64. Accordingly, a state law which purported to establish distinct qualifications for congressional elections would be invalid as repugnant to Article I, § 2, and the Seventeenth Amendment. By the same token, it cannot be gainsaid that federal legislation which had no objective other than to alter the qualifications to vote in congressional elections would be invalid for the same reasons. What the Constitution has fixed may not be changed except by constitutional amendment.

Contrary to the submission of my Brother BLACK, Article I, § 4 does not create in the federal legislature the power to alter the constitutionally established qualifications to vote in congressional elections. That section provides that the legislatures in each State shall prescribe the "times, places and manner of holding elections for Senators and Representatives," but reserves in Congress the power to "make or alter such regulations, except as to the place of choosing Senators." The "manner" of

holding elections can hardly be read to mean the *qualifications* for voters, when it is remembered that § 2 of the same Article I explicitly speaks of the "qualifications" for voters in elections to choose Representatives. It is plain, in short, that when the Framers meant qualifications they said "qualifications." That word does not appear in Article I, § 4. Moreover, § 4 does not give Congress the power to do anything that a State might not have done, and, as pointed out above, no State may establish distinct qualifications for congressional elections. The States, of course, are free to pass such laws as are necessary to assure fair elections. Congressional power under § 4 is equally broad with respect to congressional elections. *United States* v. *Classic*, 313 U. S. 299. But the States are not free to prescribe qualifications for voters in federal elections which differ from those prescribed for the most numerous branch of the state legislature. And the power of Congress to do so cannot, therefore, be found in Article I, § 4.

This view is confirmed by extrinsic evidence of the intent of the Framers of the Constitution. An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might "at any time be altered and superseded by the Legislature of the United States." [1] The records of the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications "the same from Time to Time as those of the electors in the several States, of the most numerous Branch of their own Legislatures." [2] The proposed draft

[1] 2 M. Farrand, The Records of the Federal Convention (1911) 153.
[2] *Id.*, at 163–164.

reported by the Committee on Detail to the Convention included the following:

> "The qualifications of the electors shall be the same from time to time, as those of the electors in the several States, of the most numerous branch of their own Legislatures." Art. IV, § 1.
>
> "The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States." [3] Art. VI, § 1.

On August 7, Gouverneur Morris moved to strike the last clause of the proposed Article IV, § 1 and either to provide a freehold limitation on suffrage or to add a clause permitting Congress to alter the electoral qualifications.[4] This motion was opposed by Oliver Ellsworth, George Mason, Madison, and Franklin. Ellsworth protested that the proposal favored aristocracy. If the legislature could alter qualifications, it could disqualify a great proportion of the electorate.[5] George Mason voiced a similar objection. "A power to alter the qualifications would be a dangerous power in the hands of the legislature." [6] To the same effect Madison said:

> "The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be left to be regulated by the Legislature." [7]

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[3] *Id.*, at 178–179.
[4] *Id.*, at 201, 207.
[5] *Id.*, at 201.
[6] *Id.*, at 201–202.
[7] *Id.*, at 203.

The proposed motion was defeated by a seven-to-one vote,[8] and no substantive change in Article I, § 2 was proposed or made thereafter.

Thus, Alexander Hamilton accurately reported the intent of the Convention when he wrote in The Federalist No. 60 that the authority of the national government "would be expressly restricted to the regulation of the *times*, the *places* and the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution and are unalterable by the legislature [*i. e.* Congress]." (Emphasis in original.)

Different provisions of the Constitution govern the selection of the President and the Vice President. Article II and the Twelfth Amendment provide for election by Electors. Article II specifies that each State shall appoint Electors "in such manner as the legislature thereof may direct." Because the Constitution does not require the popular election of members of the Electoral College, it does not specify the qualifications which voters must have when the selection of Electors is by popular election. This is left to the States in the exercise of their power to "direct" the manner of choosing Presidential Electors. *Williams* v. *Rhodes*, 393 U. S. 23, 29. When Electors are chosen by popular election, the Federal Government has the power to assure that such elections are orderly and free from corruption. *Burroughs* v. *United States*, 290 U. S. 534. But in *Burroughs* the Court noted of the Act under review: "Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." 290 U. S., at 544. The Court quoted with approval the following passage from

[8] *Id.*, at 206.

Ex parte Yarbrough, 110 U. S. 651: "[T]he importance to the general government of having the actual election—the voting for those members—free from force and fraud is not diminished by the circumstance that the qualification of the voter is determined by the law of the State where he votes." 290 U. S., at 546. And in *United States* v. *Classic*, 313 U. S. 299, the Court was careful to point out that it is the "right of *qualified* voters within a state to cast their ballots and have them counted" which is a privilege of United States citizenship amenable to congressional protection. *Id.*, at 315 (emphasis added). See also *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 552 (No. 3230) (CCED Pa.).

The issue then is whether, despite the intentional withholding from the Federal Government of a general authority to establish qualifications to vote in either congressional or presidential elections, there exists congressional power to do so when Congress acts with the objective of protecting a citizen's privilege to move his residence from one State to another. Although the matter is not entirely free from doubt, I am persuaded that the constitutional provisions discussed above are not sufficient to prevent Congress from protecting a person who exercises his constitutional right to enter and abide in any State in the Union from losing his opportunity to vote, when Congress may protect the right of interstate travel from other less fundamental disabilities. The power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution. *Williams* v. *Rhodes*, *supra*; cf. *Shapiro* v. *Thompson*, *supra*. The power which Congress has exercised in enacting § 202 is not a general power to prescribe qualifications for voters in either federal or state elections. It is

confined to federal action against a particular problem clearly within the purview of congressional authority. Finally, the power to facilitate the citizen's exercise of his constitutional privilege to change residence is one which cannot be left for exercise by the individual States without seriously diminishing the level of protection available. As I have sought to show above, federal action is required if this privilege is to be effectively maintained. We should strive to avoid an interpretation of the Constitution that would withhold from Congress the power to legislate for the protection of those constitutional rights which the States are unable effectively to secure. For all these reasons, I conclude that it was within the power of Congress to enact § 202.[9]

III

Section 302 of the Voting Rights Act Amendments of 1970 undertakes to enfranchise in all federal, state, and local elections those citizens 18 years of age or older who are now denied the right to vote by state law because they have not reached the age of 21. Although it was found necessary to amend the Constitution in order to confer a federal right to vote upon Negroes [10] and upon females,[11] the Government asserts that a federal right

[9] Whether a particular State's durational residency requirement for voters may violate the Equal Protection Clause of the Fourteenth Amendment presents questions which are for me quite different from those attending the constitutionality of § 202. See *Sirak* v. *Brown*, — F. 2d — (CA6 1970); *Cocanower* v. *Marston*, — F. Supp. — (D Ariz. 1970); *Burg* v. *Canniffee*, — F. Supp. — (D Mass. 1970); *Ellington* v. *Blumstein*, — F. Supp. — (MD Tenn. 1970); *Hadnott* v. *Amos*, — F. Supp. — (MD Ala. 1970); *Bufford* v. *Holton*, — F. Supp. — (ED Va. 1970); *Lester* v. *Board of Elections*, — F. Supp. — (DC 1970).

[10] U. S. Const., Amendment XV.

[11] U. S. Const., Amendment XIX; see also *Minor* v. *Happersett*, 21 Wall. 162.

to vote can be conferred upon people between 18 and 21 years of age simply by this Act of Congress. Our decision in *Katzenbach* v. *Morgan*, 379 U. S. 294, it is said, established the power of Congress, under § 5 of the Fourteenth Amendment, to nullify state laws requiring voters to be 21 years of age or older if Congress could rationally have concluded that such laws are not supported by a "compelling state interest."

In my view, neither the *Morgan* case, nor any other case upon which the Government relies, establishes such congressional power, even assuming that all those cases were rightly decided.[12] MR. JUSTICE BLACK is surely correct when he writes, "It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elecions, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." *Supra*, p. —. For the reasons which I have set out in Part II of this opinion, it is equally plain to me that the Constitution just as completely withholds from Congress the power to alter by legislation qualifications for voters in federal elections, in view of the explicit provisions of Article I, Article II, and the Seventeenth Amendment.

To be sure, recent decisions have established that state action regulating suffrage is not immune from the impact

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[12] *Carrington* v. *Rash*, 380 U. S. 89 (1965); *Louisiana* v. *United States*, 380 U. S. 145 (1965); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *Kramer* v. *Union Free School Dist. No. 15*, 395 U. S. 621 (1969); *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970).

of the Equal Protection Clause.[13] But we have been careful in those decisions to note the undoubted power of a State to establish a qualification for voting based on age. See, *e. g.*, *Kramer* v. *Union School District*, 395 U. S. 621, 625; *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, 51. Indeed, none of the opinions filed today suggest that the States have anything but a constitutionally unimpeachable interest in establishing some age qualification as such. Yet to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point rather than another. Obviously, the power to establish an age qualification must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done.[14]

Katzenbach v. *Morgan*, *supra*, does not hold that Congress has the power to determine what are and what are

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[13] See, *e. g.*, cases cited *supra*, n. 12.

[14] If the Government is correct in its submission that a particular age requirement must meet the "compelling interest" standard, then, of course, a substantial question would exist whether a 21-year-old voter qualification is constitutional even in the absence of congressional action, as my Brothers point out. *Ante*, p. —. Yet it is inconceivable to me that this Court would ever hold that the denial of the vote to those between the ages of 18 and 21 constitutes such an invidious discrimination as to be a denial of the equal protection of the laws. The establishment of an age qualification is not state action aimed at any discrete and insular minority. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4. Moreover, so long as a State does not set the voting age higher than 21, the reasonableness of its choice is confirmed by the very Fourteenth Amendment upon which the Government relies. Section 2 of that Amendment provides for sanctions when the right to vote "is denied to any of the male inhabitants of such State, *being twenty-one years of age*, and citizens of the United States . . . ." (Emphasis added.)

not "compelling state interests" for equal protection purposes. In *Morgan* the Court considered the power of Congress to enact a statute whose principal effect was to enfranchise Puerto Ricans who had moved to New York after receiving their education in Spanish-language Puerto Rican schools and who were denied the right to vote in New York because they were unable to read or write English. The Court upheld the statute on two grounds: that Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services; and that Congress could conclude that the New York statute was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans, an undoubted invidious discrimination under the Equal Protection Clause. Both of these decisional grounds were far-reaching. The Court's opinion made clear that Congress could impose on the States a remedy for the denial of equal protection which elaborated upon the direct command of the Constitution, and that it could override state laws on the ground that they were in fact used as instruments of invidious discrimination even though a court in an individual lawsuit might not have reached that factual conclusion. Cf. *Swain* v. *Alabama*, 380 U. S. 202.

But it is necessary to go much further to sustain § 302. The state laws which it invalidates do not invidiously discriminate against any discrete and insular minority. Unlike the statute considered in *Morgan*, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations which amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state

interests are "compelling." I concurred in MR. JUSTICE HARLAN's dissent in *Morgan*. That case, as I now read it, gave congressional power under § 5 the furthest possible legitimate reach. Yet to sustain the constitutionality of § 302 would require an enormous extension of that decision's rationale. I cannot but conclude that § 302 was beyond the constitutional power of Congress to enact.